UNITED
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International Covenant
on Civil and
Political Rights

Distr.
GENERAL

CCPR/C/57/1
23 August 1996

ENGLISH
Original: ENGLISH/FRENCH

HUMAN RIGHTS COMMITTEE

FINAL DECISIONS

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* The present document contains the mimeographed version (unedited) of the final decisions adopted by the Human Rights Committee at its fifty-second, fifty-third and fifty-fourth sessions, in 1994 and 1995, under the Optional Protocol to the International Covenant on Civil and Political Rights, and made public after their adoption. It substitutes the Official record of the General Assembly, Fiftieth session, Supplement 40 (A/50/40) vol.II, until such a time as it can be issued.

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Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 386/1989, Famara Koné v. Senegal [1] (Views adopted on 21 October 1994, fifty-second session)

Submitted by:	Famara Koné
Victim:	The author
State party:	Senegal
Date of communication:	5 December 1989 (initial submission)
Date of decision on admissibility:	5 November 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1994,

Having concluded its consideration of communication No. 386/1989 submitted to the Human Rights Committee by Mr. Famara Koné under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Famara Koné, a Senegalese citizen born in 1952 and registered resident of Dakar, currently domiciled in Ouagadougou, Burkina Faso. He claims to be a victim of violations of his human rights by Senegal but does not specifically invoke his rights under the International Covenant on Civil and Political Rights.

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[1] Pursuant to rule 85 of the Committee's rules of procedure, Mr. Birame Ndiaye did not participate in the adoption of the Committee's Views.

The facts as submitted by the author:

2.1 The author submits that in 1978, he joined the "Movement for Justice in Africa" (Mouvement pour la Justice en Afrique), whose aim is to assist the oppressed in Africa. On 15 January 1982, he was arrested in Gambia by Senegalese soldiers, allegedly for protesting against the intervention of Senegalese troops in Gambia after an attempted coup on 30 July 1981. He was transferred to Senegal, where he was detained for over four years, pending his trial, until his provisional release on 9 May 1986.

2.2 Mr. Koné claims, without giving details, that he was subjected to torture by investigating officers during one week of interrogation; he indicates that, since his release, he has been in need of medical supervision as a result. He further notes that despite his persistent requests to the regional representative(s) of the U.N. High Commissioner for Refugees, he was denied refugee status both in Gambia and Benin (1988), as well as in the Ivory Coast (1989) and apparently now in Burkina Faso (1992).

2.3 The author states that, after presidential elections in Senegal on 28 February 1988, he was re-arrested and detained for several weeks, without charges. He was released on 18 April 1988 by decision of the regional court of Dakar (Tribunal régional). He contends that, after participating in a political campaign in Guinea-Bissau directed against Senegal, he was once again arrested when he sought to enter Senegal on 6 July 1990. He was detained for six days, during which he claims to have been once again tortured by the security police, which tried to force him to sign a statement admitting attacks on State security and cooperating with the intelligence services of another State.

2.4 According to the author, his family in Dakar is being persecuted by the Senegalese authorities. On 6 June 1990, the regional court of Dakar confirmed an eviction order served by the departmental court (Tribunal départemental) of Dakar on 12 February 1990. As a result, the author and his family had to leave the house in which they had resided for the past forty years. The decision was taken at the request of the new owner, who had bought the property from the heirs of the author's grandfather in 1986. The author and his father challenged the validity of the act of sale and reaffirmed their right to the property. The municipal authorities of Dakar, however, granted a lease contract to the new owner on the basis of the act of sale, thereby confirming - without valid grounds in the author's opinion - the latter's right to the property.

2.5 As to the requirement of exhaustion of domestic remedies, the author affirms, without giving details, that as an opponent to the government, it is not possible for him to lodge a complaint against the State party's authorities. In this context, he claims that he has been threatened on several occasions by the security police.

The complaint:

3. Although the author does not invoke any of the articles of the International Covenant on Civil and Political Rights, it appears from the context of his submissions that he claims violations of articles 7, 9 and 19.

The State party's information and observations:

4.1 The State party contends that the author is not at all a victim of political persecution and has not been prevented from expressing his opinions, but that he is merely a person rebellious to any type of authority.

4.2 Concerning the author's allegation of torture and ill-treatment, the State party indicates that torture constitutes a punishable offence under the Senegalese Criminal Code, which provides for various penalties for acts of torture and ill-treatment, increasing in severity to correspond with the gravity of the physical consequences of the torture. Other provisions of the Criminal Code provide for an increase of the punishment if the offence is committed by an official or civil servant in the exercise of his functions. Pursuant to article 76 of the Code of Criminal Procedure, the author could have and should have submitted a complaint to the competent judicial authorities against the police officers held responsible for his treatment. The State party further points out that Mr. Koné had the possibility, forty-eight hours after his apprehension, to be examined by a doctor, at his own request or that of his family, under article 56, paragraph 2, of the Code of Criminal Procedure.

4.3 Concerning the author's allegation of arbitrary detention in 1982, the State party points out that Mr. Koné was remanded by order of an examining magistrate. As this order was issued by an officer authorized by law to exercise judicial power, his provisional detention cannot be characterized as illegal or arbitrary. Furthermore, articles 334 and 337 of the Penal Code criminalize acts of arbitrary arrest and detention. After his provisional release (élargissement) on 9 May 1986, Mr. Koné could have seized the competent judicial authorities under article 76 of the Code of Criminal Procedure.

4.4 With regard to the allegations pertaining to the eviction order, the State party observes that the judgment which confirmed the order (i.e. the judgment of the Tribunal régional) could have been appealed further to the Supreme Court, pursuant to article 3 of Decree No. 60-17 of 3 September 1960, concerning the rules of procedure of the Supreme Court) and article 324 of the Code of Civil Procedure. Furthermore, as the Senegalese courts have not yet ruled on the substance of the matter, i.e. the title to the property, the author could have requested the civil court to rule on the substance.

The Committee's admissibility decision:

5.1 During its 43rd session, the Committee considered the admissibility of the communication. It noted that the author's claim concerning the eviction from his family home related primarily to alleged violations of his right to property, which is not protected by the Covenant. Since the Committee is only competent to consider allegations of violations of any of the rights protected under the Covenant, the author's claim in respect of this issue was deemed inadmissible under article 3 of the Optional Protocol.

5.2 Concerning the claim that the author had been tortured and ill-treated by the security police, the Committee noted that the author had failed to take steps to exhaust domestic remedies since he allegedly could not file complaints against Senegalese authorities as a political opponent. It considered, however, that domestic remedies against acts of torture could not be deemed a priori ineffective and, accordingly, that the author was not absolved from making a reasonable effort to exhaust them. This part of the communication was therefore declared inadmissible under article 5, paragraph 2(b), of the Protocol.

5.3 As to the allegations relating to articles 9 and 19, the Committee noted that the State party had failed to provide information on the charges against Mr. Koné, nor on the applicable law governing his detention from 1982 to 1986, from February to April 1988 and in July 1990, nor sufficient information on effective remedies available to him. It further observed that the State party's explanation that the period of detention 1982-1986 could not be deemed arbitrary simply because the detention order was issued by judicial authority did not answer the question whether the detention was or was not contrary to article 9. In the circumstances, the Committee could not conclude that there were effective remedies available to the author and considered the requirements of article 5, paragraph 2(b), of the Optional Protocol to have been met in this respect.

5.4 On 5 November 1991, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9 and 19 of the Covenant. The State party was requested, in particular, to explain the circumstances under which the author was detained from 1982 to 1986, in 1988 and in 1990, indicating the charges against him and the applicable legislation, and to forward to the Committee copies of the detention order(s) issued by the examining magistrates and of the decision of the Tribunal régional of Dakar of 18 April 1988.

The State party's information on the merits of the communication:

6.1 In its submission on the merits, the State party provides the information requested by the Committee. As to the period of detention 1982-1986, it observes that the author was detained pursuant to a detention order (mandat de dépôt) issued by the Senior Examining Magistrate of Dakar, after having been formally charged with acts threatening national security. This was duly recorded under No. 406/82 in the register of complaints of the prosecutor's office of Dakar as well as under registry number 7/82 at the office of the examining magistrate. The acts attributed to the author are an offence under Section 80 (Chapter I) of the Senegalese Penal Code.

6.2 The procedure governing provisional custody is governed by article 139 of the Code of Criminal Procedure, which provides for the issuance of a detention order upon request of the Department of Public Prosecutions. Paragraph 2 of this article stipulates that a request for release on bail must be rejected if the public prosecutor's office files a written objection to the request. Notwithstanding, a request for release on bail may at any moment be formulated by the accused or his representative. The magistrate is obliged to rule, by reasoned decision (par ordonnance spécialement motivée) within five days of the receipt of the request. If the magistrate does not decide within the deadline, the accused may directly appeal to the competent chamber of the Tribunal Correctionnel (article 129, paragraph 5); and if the request for release on bail is rejected, the accused may appeal in accordance with the provisions of article 180 of the Code of Criminal Procedure.

6.3 Upon concluding his investigations in the case, the examining magistrate concluded that the charges against Mr. Koné were substantiated and accordingly, ordered his case to be tried by the criminal court of Dakar. However, in the light of the author's character and previous documented behaviour, the magistrate considered it appropriate to request a mental status examination and, pending its results, ordered the author's provisional release on 9 May 1986, by judgment No. 1898. The judicial procedure never led a judgment on the merits, as the author fell under the provisions of Amnesty Law No. 88-01 of 4 June 1988.

6.4 In its additional comments on the merits, dated 25 February 1994, the Senegalese Government recounts the circumstances under which the author was held in detention between 1982 and 1986. It states that after his arrest, Mr. Koné was brought before an examining magistrate who, applying the provisions of article 101 of the Code of Criminal Procedure, informed him, by way of an indictment, of the charges entered against him, advised him of his right to choose counsel from among the lawyers listed in the Roster, and placed him under a detention order on 28 January 1982. At the conclusion of a legitimate preliminary investigation, he was committed for trial by the examining magistrate, pursuant to a committal order dated 10 September 1983. The State party specifies that the author "never formulated a request for release throughout the investigation of his case", as authorized by articles 129 and 130 of the Code of Criminal Procedure. The State party concludes that "no expression of any intention to obstruct his provisional release can be deduced from these proceedings".

6.5 The State party stresses that after he was committed to the competent court, the author received a notice to appear before the court on 10 December 1983; the case was not, however, heard on that date; a series of postponements followed. The State party adds that the author "did not file a request for provisional release until mid-May 1986, a request which was granted pursuant to an interlocutory judgment rendered on 9 May 1986".

6.6 With regard to the purpose of Amnesty Law No. 88-01 of 4 June 1988, which was applied to the author, the State party points out that the law does not apply only to the Casamance events, even though it was passed in the context of efforts to contain them. It adds that "the detention period of the person concerned coincided with a period of serious disturbances of national public order caused by the Casamance events, and the State Security Court, the only court of special jurisdiction in Senegal, had to deal with the cases of 286 detainees between December 1982 and 1986", when that Court consisted only of a president, two judges, one government commissioner, and an examining magistrate.

6.7 The State party notes furthermore that, although under the terms of article 9, paragraph 3, of the Covenant, pre-trial detention should not be the rule, it may nevertheless constitute an exception, especially during periods of serious unrest, and given that the accused, committed for trial and summoned to appear on a fixed date, had never expressed a wish of any kind to be granted provisional release. It concludes that the preliminary investigation and inquiry were conducted in an entirely legitimate manner, in accordance with the applicable legal provisions and with the provisions of article 9 of the Covenant.

6.8 In further submissions dated 4 and 11 July 1994, the State party justifies the length of the author's pre-trial detention between 1982 and May 1986 with the complexity of the factual and legal situation. It notes that the author was a member of several revolutionary groups of Marxist and Maoist inspiration, which had conspired to overthrow several governments in Western Africa, including in Guinea Bissau, Gambia and Senegal. To this effect, the author had frequently travelled to the countries neighbouring Senegal, where he visited other members of this revolutionary network or foreign government representatives. It also observes that it suspected the author of having participated in an unsuccessful coup attempt in Gambia in December 1981, and that he had sought to destabilize the then Government of Sekou Touré in Guinea. In the light of these international ramifications, the State party claims, the judicial investigations in the case were particularly complex and protracted, as they necessitated formal requests for judicial cooperation with other sovereign states.

6.9 In a final submission dated 2 September 1994, the State party reiterates that the detention of Mr. Koné was made necessary because of well-founded suspicions that his activities were endangering the State party's internal security. After his release on bail, the State party observes, no judicial instance in Senegal has ever been seized by Mr. Koné with a request to determine the lawfulness of his detention between January 1982 and May 1986. Given the author's "passivity" in pursuing remedies which were available to him, the State party concludes that the author's claims are inadmissible on the basis of non-exhaustion of domestic remedies.

6.10 Concerning the author's detention in 1988, the State party affirms that Mr. Koné's detention did not last two months but only six days. He was arrested and placed in custody on 12 April 1988, upon orders of the Public Prosecutor of Dakar, and charged with offences against the Law on States of Emergencies (Law 69-26 of 22 April 1969, Decree No. 69-667 of 10 June 1969 and No. 88-229 of 29 February 1988, Ministerial Decree No. 33364/M.INT of 22 March 1988). He was tried, together with eight other individuals, by a Standing Court (Tribunal des Flagrants Délits), which, by judgment No. 1891 of 18 April 1988, ordered his release.

6.11 The State party observes that the author has neither been re-arrested nor been the target of judicial investigations or procedures since his release in April 1988. If he had been arrested or detained, there would have been a duty, under articles 55 and 69 of the Code of Criminal Procedure, to immediately notify the Office of the Public Prosecution. No such notification was ever received. Furthermore, had the author been detained arbitrarily in 1990, he could, upon release, have immediately filed a complaint against those held responsible for his detention; no complaint was ever received in this context.

6.12 The State party concludes that there is no evidence of a violation of any provisions of the Covenant by the Senegalese judicial authorities.

7.1 In his comments, the author seeks to refute the accuracy of the State party's information and chronology. Thus, he claims that he was first requested on 2 September 1983 to appear before the Tribunal Correctionnel on 1 December 1983. On this occasion, the president of the court requested further information (complément d'information) and postponed the trial to an unspecified subsequent date. On the same occasion and not in the spring of 1986, as indicated by the State party, a mental status examination was ordered by the court. The author forwards a copy of a medical certificate signed by a psychiatrist of a Dakar hospital, and which confirms that a mental status examination was carried out on the author on 25 January 1985; it concluded that Mr. Koné suffered from pathological disorder (pathologie psychiatrique) and needed continued medical supervision ("pathologie ... à traiter sérieusement").

7.2 The author reiterates that he was tried on 1 December 1983 by the Tribunal Correctionnel, that the court adjourned to consider its findings until 15 December 1983, and that his family was present in the courtroom. According to him, that version can be corroborated by the prison log.

7.3 As for the State party's argument that he never filed a request for provisional release, the author simply notes that he had protested his arbitrary detention to several members of the judiciary visiting the prison where he was held, and that not until 1986 did a member of the staff of the Government Procurator's office and the prison's social services suggest that he request provisional release.

7.4 The author affirms that his arrest in January 1982 was the result of manoeuvres orchestrated by the Senegalese ambassador in Gambia, who had been angered by the author's leading role, between 1978 and 1981, in several demonstrations, which had inter alia caused damage to the building of the Senegalese Embassy in Banjul[2].

7.5 Concerning the period of detention in 1988, the author recalls that he was arrested "around 2 March 1988" together with several other individuals and questioned about the violent incidents that had accompanied the general elections of February 1988. He was released "around 20 March 1988", after having addressed a letter to President A. Diouf about his allegedly arbitrary detention. On 6 April 1988, he was re-arrested, and after six days spent in a police lock-up, indicted on 12 April 1988. On 18 April 1988, he was released by decision of the Tribunal Régional of Dakar[3].

7.6 The author reaffirms that he was placed once more in custody in 1990; he claims that he was arrested at the border and transferred to Dakar, where he was detained by agents of the Ministry of the Interior. He was booked and made to sign a statement (procès-verbal) on 12 July 1990, which accused him inter alia of offences against State security. He ignores why he was released on the same day.

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[2] The author, in a letter dated 10 August 1992, admits to having broken windows in the building of the Senegalese Embassy in Banjul.

[3] The decision simply orders the release of the author and eight other co-accused, but is not motivated.

7.7 Finally, the author affirms that he was once more apprehended on 20 July 1992 and detained for several hours. He was allegedly questioned in relation with a manifestation that had taken place in a popular quarter of Dakar. The Government apparently suspects him of sympathizing with the separatist Movement of Casamance's Democratic Forces (Mouvement des Forces Démocratiques de la Casamance - MFDC) in the South of the country, where separatists have clashed violently with government forces. The author denies any involvement with the MFDC and claims that as a result of constant surveillance by the State party's police and security services, he suffers from nervous disorders.

7.8 The author concludes that the State party's submissions are misleading and tendentious, and affirms that these submissions seek to cover serious and persistent human rights violations in Senegal.

Examination of the merits:

8.1 The Human Rights Committee has examined the communication in the light of all the information provided by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that the author does not question the legal nature of the charges against him, as described in the State party's submission under article 4, paragraph 2, of the Optional Protocol - he does however reject in general terms the factual accuracy of part of the State party's observations, while some of his statements contain blanket accusations of bad faith on the part of the State party. Conversely, the State party's submission does not address issues under article 19 other than by affirming that the author is adverse to any type of authority, and confines itself to the chronology of administrative and judicial proceedings in the case. In the circumstances, the Committee has examined whether such information as has been submitted is corroborated by any of the parties' submissions.

8.3 As to the claims of violations of article 9, the Committee notes that, in respect of the author's detention from 1982 to 1986 and in the spring of 1988, the State party has provided detailed information about the charges against the author, their legal qualification, the procedural requirements under the Senegalese Code of Criminal Procedure, and the legal remedies available to the author to challenge his detention. The records reveal that these charges were not based, as claimed by the author, on his political activities or upon his expressing opinions hostile to the Senegalese government. In the circumstances, it cannot be concluded that the author's arrest and detention were arbitrary or not based "on such grounds and in accordance with such procedure as are established by law". However, there are issues concerning the length of the author's detention, which are considered below (paragraphs 8.6 to 8.8).

8.4 As to the author's alleged detention in 1990, the Committee has taken note of the State party's argument that its records do not reveal that Mr. Koné was again arrested or detained after April 1988. As the author has not corroborated his claim by further information, and given that the copies of the medical reports he refers to in support of his claim of ill-treatment pre-date the alleged date of his arrest (6 July 1990), the

Committee concludes that the claim of a violation of article 9 in relation to the events in July 1990 has not been sufficiently corroborated.

8.5 Similarly, the State party has denied that the author was arrested for the expression of his political opinions or because of his political affiliations, and the author has failed to adduce material to buttress his claim to this effect. Nothing in the material before the Committee supports the claim that the author was arrested or detained on account of his participation in demonstrations against the regime of President Diouf, or because of his presumed support for the Movement of Casamance's Democratic Forces. On the basis of the material before it, the Committee is of the opinion that there has been no violation of article 19.

8.6 The Committee notes that the author was first arrested on 15 January 1982 and released on 9 May 1986; the length of his detention, four years and almost four months, is uncontested. It transpires from the State party's submission that no trial date was set throughout this period, and that the author was released provisionally, pending trial. The Committee recalls that under article 9, paragraph 3, anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release. What constitutes "reasonable time" within the meaning of article 9, paragraph 3, must be assessed on a case-by-case basis.

8.7 A delay of four years and four months during which the author was kept in custody (considerably more taking into account that the author's guilt or innocence had not yet been determined at the time of his provisional release on 9 May 1986) cannot be deemed compatible with article 9, paragraph 3, in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or to his representative. No such circumstances are discernible in the present case. Accordingly, the author's detention was incompatible with article 9, paragraph 3. This conclusion is supported by the fact that the charges against the author in 1982 and in 1988 were identical, whereas the duration of the judicial process on each occasion differed considerably.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 9, paragraph 3, of the Covenant.

10. The Committee is of the view that Mr. Famara Koné is entitled, under article 2, paragraph 3(a), of the Covenant, to a remedy, including appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee

wishes to receive from the State party, within ninety days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

B. Communication No. 400/1990; Darwinia R. Mónaco v. Argentina (Views adopted on 3 April 1995, fifty-third session)

Submitted by:	Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario [represented by counsel]
Victims:	The author and her granddaughter
State party:	Argentina
Date of communication:	2 April 1990 (initial submission)
Date of decision on admissibility:	8 July 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1995,

Having concluded its consideration of communication No. 400/1990 submitted to the Human Rights Committee by Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Darwinia Rosa Mónaco de Gallicchio, an Argentine citizen born in 1925, currently residing in Buenos Aires. She presents the communication on her own behalf and on behalf of her granddaughter, Ximena Vicario, born in Argentina on 12 May 1976 and 14 years of age at the time of submission of the communication. She claims that they are victims of violations by Argentina of articles 2, 3, 7, 8, 9, 14, 16, 17, 23, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by counsel. The Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986.

Facts as submitted by the author

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine-month-old child to the Headquarters of the Federal Police (Departamento Central de la Policía Federal) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (histocompatibilidad) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (ocultamiento de menor) and forgery of documents, in violation of articles 5, 12, 293 and 146 of the Argentine Criminal Code.

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires. With this, the author submits, available and effective domestic remedies have been exhausted. She adds that it would be possible to file further appeals in civil proceedings, but submits that these would be unjustifiably prolonged, to the extent that Ximena Vicario might well reach the age of legal competence by the time of a final decision. Furthermore, until such time as legal proceedings in the case are completed, her granddaughter must continue to bear the name given to her by S.S.

Complaint

3.1 The author claims that the judicial decisions in the case violate article 14 (bis) of the Argentine Constitution, which guarantees the protection of the family, as well as articles 23 and 24 of the Covenant. It is further submitted that S.S.'s regular visits to the child entail some form of "psycho-affective" involuntary servitude in violation of article 15 of the Argentine Constitution and article 8 of the Covenant. The fact that the author is denied standing in the guardianship proceedings is deemed to constitute a violation of the principle of equality before the law, as guaranteed by article 16 of the Argentine

Constitution and articles 14 and 26 of the Covenant.

3.2 The author also claims a violation of the rights of her granddaughter, who she contends is subjected to what may be termed psychological torture, in violation of article 7 of the Covenant, every time she is visited by S.S. Another alleged breach of the Covenant concerns article 16, under which every person has the right to recognition as a person before the law, with the right to an identity, a name and a family: that Ximena Vicario must continue to bear the name given to her by S.S. until legal proceedings are completed is said to constitute a violation of her right to an identity. Moreover, the uncertainty about her legal identity has prevented her from obtaining a passport under her real name.

3.3 The author submits that the forced acceptance of visits from S.S. violates her granddaughter's rights under article 17, which should protect Ximena Vicario from arbitrary interference with her privacy. Moreover, the author contends that her own right to privacy is violated by the visits of S.S., and by her exclusion from the judicial proceedings over the guardianship of Ximena Vicario. Article 23, which protects the integrity of the family and of children, allegedly is violated in that Ximena Vicario is constantly exposed to, and maintained in, an ambiguous psychological situation.

State party's observations and author's comments

4.1 The State party, after recapitulating the chronology of events, concedes that with the dismissal of the author's appeal on 29 December 1989, the author has, in principle, complied with the requirements of article 5, paragraph 2(b), of the Optional Protocol. Nevertheless, it draws attention to the inherent "provisional character" of judicial decisions in adoption and guardianship proceedings; such decisions may be, and frequently are, questioned either through the appearance of new circumstances and facts or the re-evaluation of circumstances by the competent authorities seized of the matter.

4.2 In the author's case, the State party notes, new factual and legal circumstances have come to light which will require further judicial proceedings and decisions; the latter in turn may provide the author with an effective remedy. Thus, a complaint was filed on 13 February 1990 in the Federal Court of First Instance by the Federal Prosecutor charged with the investigation of the cases of the children of disappeared persons; the case was registered under case file A-56/90. On 16 September 1990, the Prosecutor submitted a report from a professor of juvenile clinical psychology of the University of Buenos Aires, which addressed the impact of the visits from S.S. on the mental health of Ximena Vicario; the report recommended that the visiting rights regime should be reviewed.

4.3 The State party further indicates that before the civil courts in the province of Buenos Aires (Juzgado en lo Civil No. 10 del Departamento Judicial de Morón) an action initiated by the author had been pending, with a view to declaring the adoption of Ximena Vicario by S.S. invalid. On 9 August 1991, the Juzgado en lo Civil No. 10 held that Ximena Vicario's adoption and her birth inscription as R.P.S. were invalid. The decision is on appeal before the Supreme Court of the province of Buenos Aires.

4.4 Finally, the State party notes that criminal proceedings against S.S. remain pending, for the alleged offences of falsification of documents and kidnapping of a minor. A final decision in this matter has not been taken.

4.5 . The State party concludes that, in the light of the provisional nature of decisions in guardianship proceedings, it is important to await the outcome of the various civil and criminal actions pending in the author's case and that of Ximena Vicario, as this may modify the author's and Ximena Vicario's situation. Accordingly, the State party requests the Committee to decide that it would be inappropriate to adjudicate the matter under consideration at this time.

4.6 In respect of the alleged violations of the Argentine Constitution, the State party affirms that it is beyond the Committee's competence to evaluate the compatibility of judicial decisions with domestic law, and that this part of the communication should be declared inadmissible.

5.1 In her comments, the author contends that no new circumstances have arisen that would justify a modification of her initial claims submitted to the Committee. Thus, her granddaughter continues to receive regular visits from S.S., and the civil and criminal proceedings against the latter have not shown any notable progress. The author points out that by the spring of 1991, the criminal proceedings in case A-62/84 had been pending for over six years at first instance; as any judgement could be appealed to the Court of Appeal and the Supreme Court, the author surmises that Ximena Vicario would reach legal age (18 years) without a final solution to her, and the author's, plight. Therefore, the judicial process should be deemed to have been "unreasonably prolonged".

5.2 The author contends that the Supreme Court's decision denying her standing in the judicial proceedings binds all other Argentine tribunals and therefore extends the violations suffered by her to all grandparents and parents of disappeared children in Argentina. In support of her contention, she cites a recent judgement of the Court of Appeal of La Plata, concerning a case similar to hers. These judgements, in her opinion, have nothing "provisional" about them. In fact, the psychological state of Ximena Vicario is said to have deteriorated to such an extent that, on an unspecified date, a judge denied S.S. the month of summer vacation with Ximena Vicario she had requested; however, the judge authorized S.S. to spend a week with Ximena Vicario in April 1991. The author concludes that she should be deemed to have complied with the admissibility criteria of the Optional Protocol.

Committee's decision on admissibility

6.1 During its forty-fifth session the Committee considered the admissibility of the communication. The Committee took note of the State party's observations, according to which several judicial actions which potentially might provide the author with a satisfactory remedy were pending. It noted, however, that the author had availed herself of domestic appeals procedures, including an appeal to the Supreme Court of Argentina, and that her appeals had been unsuccessful. In the circumstances, the author was not required, for purposes of article 5, paragraph 2(b), of the Optional Protocol, to re-petition the Argentine courts if new circumstances arose in the dispute over the guardianship of

Ximena Vicario.

6.2 In respect of the author's claims under articles 2, 3, 7, 8 and 14, the Committee found that the author had failed to substantiate her claims, for purposes of admissibility.

7. On 8 July 1992 the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under articles 16, 17, 23, 24 and 26 of the Covenant.

Author's and State party's further submissions on the merits

8.1 By note verbale of 7 September 1992, the State party forwarded the text of the decision adopted on 11 August 1992 by the Cámara de Apelación en lo Civil y Comercial Sala II del Departamento Judicial de Morón, according to which the nullity of Ximena Vicario's adoption was affirmed.

8.2 By note verbale of 6 July 1994 the State party informed the Committee that S.S. had appealed the nullity of the adoption before the Supreme Court of the Province of Buenos Aires and that Ximena Vicario had been heard by the court.

8.3 With regard to the visiting rights initially granted to S.S. in 1989, the State party indicates that these were terminated in 1991, in conformity with the express wishes of Ximena Vicario, then a minor.

8.4 With regard to the guardianship of Ximena Vicario, which had been granted to her grandmother on 29 December 1988, the Buenos Aires Juzgado Nacional de Primera Instancia en lo Criminal y Correccional terminated the regime by decision of 15 June 1994, bearing in mind that Ms. Vicario had reached the age of 18 years.

8.5 In 1993 the Federal Court issued Ximena Vicario identity papers under that name.

8.6 As to the criminal proceedings against S.S., an appeal is currently pending.

8.7 In the light of the above, the State party contends that the facts of the case do not reveal any violation of articles 16, 17, 23, 24 or 26 of the Covenant.

9.1 In her submission of 10 February 1993, the author expressed her concern over the appeal lodged by S.S. against the nullity of the adoption and contends that this uncertainty constitutes a considerable burden to herself and to Ximena Vicario.

9.2 In her submission of 3 February 1995, the author states that the Supreme Court of the Province of Buenos Aires has issued a final judgement confirming the nullity of the adoption.

Committee's Views on the merits

10.1 The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol. It bases its Views on the following considerations.

10.2 With regard to an alleged violation of article 16 of the Covenant, the Committee finds that the facts before it do not sustain a finding that the State party has denied Ximena Vicario recognition as a person before the law. In fact, the courts of the State party have endeavoured to establish her identity and issued her identity papers accordingly.

10.3 As to Darwinia Rosa Mónaco de Gallicchio's claim that her right to recognition as a person before the law was violated, the Committee notes that, although her standing to represent her granddaughter in the proceedings about the child's guardianship was denied in 1989, the courts did recognize her standing to represent her granddaughter in a number of proceedings, including her suit to declare the nullity of the adoption, and that she was granted guardianship over Ximena Vicario. While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs. Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs. Mónaco's standing constituted a violation of article 24 of the Covenant.

10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina on 8 November 1986,[4] and the Committee is not in a position ratione temporis to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S.S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S.S, following the recommendations of psychologists and Ximena Vicario's own wishes. Nevertheless, these outcomes appear to have been delayed by the initial denial of standing of Mrs. Mónaco to challenge the visitation order.

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[4] See the Committee's decision on admissibility concerning communication No. 275/1988, S.E. v. Argentina, declared inadmissible ratione temporis on 26 March 1990, para. 5.3.

10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994, and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24,[5] in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

10.6 As to an alleged violation of article 26 of the Covenant, the Committee concludes that the facts before it do not provide sufficient basis for a finding that either Ms. Vicario or her grandmother were victims of prohibited discrimination.

11.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

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[5] General Comment No. 17, adopted at the thirty-fifth session of the Committee, in 1989.

11.3 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

12. With reference to the violations of the Covenant which occurred prior to 8 November 1986, the Committee encourages the State party to persevere in its efforts to investigate the disappearance of children, determine their true identity, issue to them identity papers and passports under their real names, and grant appropriate redress to them and their families in an expeditious manner.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

C. Communication No. 447/1991: Leroy Shalto v. Trinidad and Tobago (Views adopted on 4 April 1995, fifty-third session)

Submitted by:	Leroy Shalto [represented by counsel]
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	16 July 1989 (initial submission)
Date of decision on admissibility:	17 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Having concluded its consideration of communication No. 447/1991 submitted to the Human Rights Committee by Mr. Leroy Shalto under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Leroy Shalto, a citizen of Trinidad and Tobago, at the time of submission of the communication awaiting execution at the State Prison of Port of Spain. He claims to be the victim of a violation of the International Covenant on Civil and Political Rights by Trinidad and Tobago, without specifying which provisions of the Covenant he considers to have been violated.

Facts as submitted by the author

2.1 The author was arrested and charged with the murder of his wife, Rosalia, on 28 September 1978. On 26 November 1980, he was found guilty as charged and sentenced to death. On 23 March 1983, the Court of Appeal quashed the conviction and sentence and ordered a retrial. At the conclusion of the retrial, on 26 January 1987, the author was again convicted of murder and sentenced to death. On 22 April 1988, the Court of Appeal dismissed his appeal; a subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 9 November 1989. On 2 December 1992, the author's death sentence was commuted to one of life imprisonment.

2.2 The evidence relied on by the prosecution during the trial was that, on 28 September 1978, following a dispute between the author and his wife in the store where she worked, the author took out a gun, aimed at his wife and shot her while she was walking away from him. Several eyewitnesses to the incident gave testimony during the trial.

2.3 In a written statement, given to the police after his arrest and duly signed by the author, the author says that he was in the store, talking to his wife, when he saw a man that he thought was police constable E. behind a refrigerator in the store. He pulled out a gun and his wife started to run in the man's direction. The author fired a shot, thereby hitting his wife. During the trial, the author claimed that he had signed the written statement under duress, while he was suffering from a leg injury sustained when he was arrested. He claimed that the part of the statement that related to the incident at the store was incorrect and fabricated by the police. After a voir dire, however, the judge admitted the statement as evidence.

2.4 In an unsworn statement during the trial, the author testified that he and his wife had separated about a month prior to the incident and that on the day in question he went to her to inquire about their two children. He added that he also wanted to ask her about a police revolver that he had found in a clothes basket at his home. After a short conversation, his wife told him that the children were not his and that "this policeman" (apparently constable E.) was a better man than he. The author then became angry and took out the revolver which he had found at home. His wife attempted to get hold of the revolver and during the struggle that ensued the weapon was discharged and she was fatally wounded. The author further stated that prior to the incident he had been harassed by police constable E., who had wrongfully arrested him two days before.

Complaint

3.1 The author claims that his retrial in January 1987 was unfair in that the trial judge, when directing the jury in respect of each of the three different versions of what had happened, misdirected the jury by stating that, in law, "words alone cannot amount to provocation", thereby depriving him of the possibility of a verdict of manslaughter based on provocation. In this context, the author submits that, in 1985, by virtue of an amendment of the Offences against the Person Act, the law in Trinidad and Tobago was amended with regard to the issue of provocation, and from then on required that the issue of provocation be left to the jury. It appears from documentation provided by the author, however, that the law applies only to trials in which an indictment was issued after 21 May 1985 and is therefore not applicable to the author's case.

3.2 Although the author does not invoke the specific articles of the Covenant, the delay in the author's retrial appears to raise issues under articles 9, paragraph 3, and 14, paragraph 3(c).

State party's observations and author's comments thereon

4.1 The State party, by its submission of 30 January 1992, refers to the jurisprudence of the Committee which holds that it is a matter for the appellate courts of States parties to the Covenant and not for the Committee to evaluate facts and evidence placed before domestic courts and to review the interpretation of domestic laws by those courts. It also refers to the Committee's jurisprudence that it is for the appellate courts and not for the Committee to review specific instructions to the jury by the trial judge, unless it is apparent that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice or that the judge manifestly violated his obligation of impartiality.

4.2 The State party argues that the facts as submitted by the author do not reveal that the judge's instructions to the jury suffered from such defects. It therefore contends that the communication is inadmissible under article 3 of the Optional Protocol.

5. In his comments on the State party's submission, the author requests the Committee to take into account the fact that he has spent more than 14 years in prison, the last six under sentence of death.

Committee's decision on admissibility

6. At its fiftieth session, the Committee considered the admissibility of the communication. It noted that, despite a specific request, the State party had failed to provide additional information about the delay between the Court of Appeal's decision of 23 March 1983 to order a retrial and the start of the retrial on 20 January 1987. The Committee considered that this delay might raise issues under article 9, paragraph 3, and article 14, paragraph 3(c), of the Covenant, which should be considered on the merits. Consequently, on 17 March 1994, the Committee declared the communication admissible in this respect.

Issues and proceedings before the Committee

7.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, following the transmittal of the Committee's decision on admissibility, no further information has been received from the State party clarifying the matter raised by the present communication. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

7.2 The Committee notes that the information before it shows that the Court of Appeal, on 23 March 1983, quashed the author's conviction for murder and ordered a retrial, which started on 20 January 1987 and at the conclusion of which he was found guilty of murder. The author remained in detention throughout this period. The

Committee recalls that article 14, paragraph 3(c), of the Covenant prescribes that anyone charged with a criminal offence has the right to be tried without undue delay, and that article 9, paragraph 3, provides further that anyone detained on a criminal charge shall be entitled to trial within a reasonable time or release. The Committee concludes that a delay of almost four years between the judgement of the Court of Appeal and the beginning of the retrial, a period during which the author was kept in detention, cannot be deemed compatible with the provisions of article 9, paragraph 3, and article 14, paragraph 3(c), of the Covenant, in the absence of any explanations from the State party justifying the delay.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9, paragraph 3, and 14, paragraph 3(c), of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee has noted that the State party has commuted the author's death sentence and recommends that, in view of the fact that the author has spent over sixteen years in prison, the State party consider the author's early release. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

D. Communication No. 453/1991; A.R. & M.A.R. Coeriel v. Netherlands (Views adopted on 31 October 1994, fifty-second session)[6]

Submitted by: A.R. Coeriel and M.A.R. Aurik [represented by counsel]

Victims: The authors

State party: The Netherlands

Date of communication: 14 January 1991 (initial submission)

Date of decision on admissibility: 8 July 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 1994,

Having concluded its consideration of communication No. 453/1991 submitted to the Human Rights Committee by A.R. Coerieland M.A.R. Aurik under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are A.R. Coeriel and M.A.R. Aurik, two Dutch citizens residing in Roermond, the Netherlands. They claim to be victims of a violation by the Netherlands of articles 17 and 18 of the International Covenant on Civil and Political Rights.

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[6] The text of individual opinions from Messrs. N. Ando and K. Herndl is appended to the Views.

The background:

2.1 The authors have adopted the Hindu religion and state that they want to study for Hindu priests ('pandits') in India. They requested the Roermond District Court (Arrondissements Rechtbank) to change their first names into Hindu names, in accordance with the requirements of their religion. This request was granted by the Court on 6 November 1986.

2.2 Subsequently, the authors requested the Minister of Justice to have their surnames changed into Hindu names. They claimed that for individuals wishing to study and practice the Hindu religion and to become Hindu priests, it is mandatory to adopt Hindu names. By decisions of 2 August and 14 December 1988 respectively, the Minister of Justice rejected the authors' request, on the ground that their cases did not meet the requirements set out in the 'Guidelines for the change of surname' (Richtlijnen voor geslachtsnaamwijziging 1976). The decision further stipulated that a positive decision would have been justified only by exceptional circumstances, which were not present in the authors' cases. The Minister considered that the authors' current surnames did not constitute an obstacle to undertake studies for the Hindu priesthood, since the authors would be able to adopt the religious names given to them by their Guru upon completion of their studies, if they so wished.

2.3 The authors appealed the Minister's decision to the Council of State (Raad van State), the highest administrative tribunal in the Netherlands and claimed inter alia that the refusal to allow them to change their names violated their freedom of religion. On 17 October 1990, the Council dismissed the authors' appeals. It considered that the authors had not shown that their interests were such that it justified the changing of surnames where the law did not provide for it. In the opinion of the Council, it was not shown that the authors' surnames needed to be legally changed to give them the chance to become Hindu priests; in this connection, the Council noted that the authors were free to use their Hindu surnames in public social life.

2.4 On 6 February 1991, the authors submitted a complaint to the European Commission of Human Rights. On 2 July 1992, the European Commission declared the authors' complaint under articles 9 and 14 of the Convention inadmissible as manifestly ill-founded, as they had not established that their religious studies would be impeded by the refusal to modify their surnames.

The complaint:

3. The authors claim that the refusal of the Dutch authorities to have their current surnames changed prevents them from furthering their studies for the Hindu priesthood and therefore violates article 18 of the Covenant. They also claim that said refusal constitutes unlawful or arbitrary interference with their privacy.

The State party's observations and the authors' comments thereon:

4.1 By submission of 7 July 1991, the State party replies to the Committee's request under rule 91 of the rules of procedure to provide observations relevant to the question of the admissibility of the communication in so far as it might raise issues under articles 17 and 18 of the Covenant.

4.2 The State party submits that Dutch law allows the change of surnames for adults in special circumstances, namely when the current surname is indecent or ridiculous, so common that it has lost its distinctive character or, in cases of Dutch citizens who have acquired Dutch nationality by naturalization, not Dutch-sounding. The State party submits that outside these categories, change of surname is only allowed in exceptional cases, where the refusal would threaten the applicant's mental or physical well-being.

4.3 With regard to Dutch citizens belonging to cultural or religious minority groups, principles have been formulated for the change of surname. One of these principles states that a surname may not be changed if the requested new name would carry with it cultural, religious or social connotations.

4.4 The State party submits that the authors in the present case have been Dutch citizens since birth and grew up in a Dutch cultural environment. Since the authors' request to change their surnames had certain aspects comparable to those of religious minorities, the Minister of Justice formally sought an opinion from the Minister of Internal Affairs. This opinion was unfavourable to the authors, as the new names requested by them were perceived as having religious connotations.

4.5 The State party states that the authors are free to carry any name they wish in public social life, as long as they do not carry a name that belongs to someone else without the latter's permission. The State party submits that it respects the authors' religious convictions and that they are free to manifest their religion. The State party further contends that the fact that the authors allegedly are prevented from following further religious studies in India because of their Dutch names, cannot be attributed to the Dutch government, but is the consequence of requirements imposed by Indian Hindu leaders.

4.6 As regards the authors' claim under article 17 of the Covenant, the State party contends that the authors have not exhausted domestic remedies in this respect, since they did not argue before the Dutch authorities that the refusal to have their surnames changed constituted an unlawful or arbitrary interference with their privacy.

4.7 In conclusion, the State party argues that the communication is inadmissible as being incompatible with the provisions of the Covenant. It further argues that the authors have failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5.1 In their reply to the State party's submission, the authors emphasize that it is mandatory to have a Hindu surname when one wants to study for the Hindu priesthood and that no exceptions to this rule are made. In this connection, they submit that if the surname is not legally changed and appears on official identification documents, they cannot become legally ordained priests. In support of their argument, the authors submit declarations made by two pandits in England and by the Swami in New Delhi.

5.2 One of the authors, Mr. Coeriel, further submits that, although a Dutch citizen by birth, he grew up in Curaçao, the United States of America and India, and is of Hindu origin, which should have been taken into account by the State party when deciding on his request to have his surname changed.

5.3 The authors maintain that their right to freedom of religion has been violated, because as a consequence of the State party's refusal to have their surnames changed, they are now prevented from continuing their study for the Hindu priesthood. In this context, they also claim that the State party's rejection of their request constitutes an arbitrary and unlawful interference with their privacy.

The Committee's admissibility decision:

6.1 During its 48th session, the Committee considered the admissibility of the communication. With regard to the authors' claim under article 18 of the Covenant, the Committee considered that the regulation of surnames and the change thereof was eminently a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18. The Committee, moreover, considered that the State party could not be held accountable for restrictions placed upon the exercise of religious offices by religious leaders in another country. This aspect of the communication was therefore declared inadmissible.

6.2 The Committee considered that the question whether article 17 of the Covenant protects the right to choose and change one's own name and, if so, whether the State party's refusal to have the authors' surnames changed was arbitrary should be dealt with on the merits. It considered that the authors had fulfilled the requirement under article 5, paragraph 2(b), of the Optional Protocol, noting that they had appealed the matter to the highest administrative tribunal and that no other remedies remained. On 8 July 1993, the Committee therefore declared the communication admissible in so far as it might raise issues under article 17 of the Covenant.

The State party's submission on the merits and the authors' comments thereon:

7.1 The State party, by submission of 24 February 1994, argues that article 17 of the Covenant does not protect the right to choose and change one's surname. It refers to the travaux préparatoires, in which no indication can be found that article 17 should be given such a broad interpretation, but on the basis of which it appears that States should be given considerable freedom to determine how the principles of article 17 should be applied. The State party also refers to the Committee's General Comment on article 17, in which it is stated that the protection of privacy is necessarily relative. Finally, the State party refers to the Committee's prior jurisprudence[7] and submits that, whenever the intervention of authorities was legitimate according to domestic legislation, the Committee has only found a violation of article 17 when the intervention was also in violation of another provision of the Covenant.

7.2 Subsidiarily, the State party argues that the refusal to grant the authors a formal change of surname was neither unlawful nor arbitrary. The State party refers to its submission on admissibility and submits that the decision was taken in accordance with the relevant Guidelines, which were published in the Government Gazette of 9 May 1990 and based on the provisions of the Civil Code. The decision not to grant the authors a change of surname was thus pursuant to domestic legislation and regulations.

7.3 As to a possible arbitrariness of the decision, the State party observes that the regulations referred to in the previous paragraph were issued precisely to prevent arbitrariness and to maintain the necessary stability in this field. The State party contends that it would create unnecessary uncertainty and confusion, in both a social and administrative sense, if a formal change of name could be effected too easily. In this connection, the State party invokes an obligation to protect the interests of others. The State party submits that in the present case, the authors failed to meet the criteria that would allow a change in their surname and that they wished to adopt names which have a special significance in Indian society. "Granting a request of this kind would therefore be at odds with the policy of the Netherlands Government of refraining from any action that could be construed as interference with the internal affairs of other cultures". The State party concludes that, taking into account all interests involved, it cannot be said that the decision not to grant the change of name was arbitrary.

8. In their comments on the State party's submission, the authors contest the State party's view that article 17 does not protect their right to choose and change their own surnames. They argue that the rejection of their request to have their surnames changed, deeply affects their private life, since it prevents them from practising as Hindu-priests. They claim that the State party should have provided in its legislation for the change of name in situations similar to that of the authors, and that the State party should have taken into account the consequences of the rejection of their request.

9.1 During its 51st session, the Committee began its examination of the merits of the communication and decided to request clarifications from the State party with respect to the regulations governing the change of names. The State party, by submission of 3 October 1994, explains that the Dutch Civil Code provides that anyone desiring a change of surname can file a request with the Minister of Justice. The Code does not specify in what cases such a request should be granted. The ministerial policy has been that a change of surname can only be allowed in exceptional cases. In principle, a person should keep the name which (s)he acquires at birth, in order to maintain legal and social stability.

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[7] See the Committee's Views with regard to communications No. 35/1978 (Aumeeruddy-Cziffra v. Mauritius, Views adopted on 9 April 1981) and No. 74/1980 (Estrella v. Uruguay, Views adopted on 29 March 1983).

9.2 To prevent arbitrariness, the policy with respect to the change of surname has been made public by issuing 'Guidelines for the change of surname'. The State party recalls that the guidelines indicate that a change of surname will be granted when the current surname is indecent or ridiculous, so common that it has lost its distinctive character, or not Dutch-sounding. In exceptional cases, the change of surname can be authorized outside these categories, for instance in cases where the denial of the change of surname would threaten the applicant's mental or physical well-being. A change of surname could also be allowed if it would be unreasonable to refuse the request, taking into account the interests of both the applicant and the State. The State party emphasizes that a restrictive policy with regard to the change of surname is necessary in order to maintain stability in society.

9.3 The Guidelines also contain rules for the new name which an applicant will carry after a change of surname has been allowed. In principle, a new name should resemble the old name as much as possible. If a completely new name is chosen, it should be a name which is not yet in use, which sounds Dutch and which does not give rise to undesirable associations (for instance, a person would not be allowed to choose a surname which would falsely give the impression that he belongs to the nobility). As regards foreign surnames, the Government's policy is that it does not wish to interfere with the law of names in other countries, nor does it wish to appear to interfere with cultural affairs of another country. This means that the new name must not give the false impression that the person carrying the name belongs to a certain cultural, religious or social group. In this sense, the policy with regard to foreign names is similar to the policy with regard to Dutch names.

9.4 The State party submits that the applicant's request is heard by the Minister of Justice, who then adopts his decision in the matter. If the decision is negative, the applicant can appeal to the independent judiciary. All decisions are being taken in accordance to the policy as laid down in the Guidelines. This policy is departed from in rare cases only, in order to prevent arbitrariness.

9.5 As regards the present case, the State party explains that the authors' request for a change of surname was refused, because it was found that no reasons existed to allow an exceptional change of surname outside the criteria laid down in the Guidelines. In this context, the State party argues that it has not been established that the authors cannot follow the desired religious education without a change of surname. Moreover, the State party argues that, even if a change of surname would be required, this condition is primarily a consequence of rules established by the Hindu-religion, and not a consequence of the application of the Dutch law of names. The State party also indicates that the desired names would identify the authors as members of a specific group in Indian society, and are therefore contrary to the policy that a new name should not give rise to cultural, religious or social associations. According to the State party, the names also conflict with the policy that new names should be Dutch-sounding.

Issues and proceedings before the Committee:

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The first issue to be determined by the Committee is whether article 17 of the Covenant protects the right to choose and change one's own name. The Committee observes that article 17 provides, inter alia, that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. The Committee considers that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name. For instance, if a State were to compel all foreigners to change their surnames, this would constitute interference in contravention of article 17. The question arises whether the refusal of the authorities to recognize a change of surname is also beyond the threshold of permissible interference within the meaning of article 17.

10.3 The Committee now proceeds to examine whether in the circumstances of the present case the State party's dismissal of the authors' request to have their surnames changed amounted to arbitrary or unlawful interference with their privacy. It notes that the State party's decision was based on the law and regulations in force in the Netherlands, and that the interference can therefore not be regarded as unlawful. It remains to be considered whether it is arbitrary.

10.4 The Committee notes that the circumstances in which a change of surname will be recognised are defined narrowly in the Guidelines and that the exercise of discretion in other cases is restricted to exceptional cases. The Committee recalls its General Comment on article 17, in which it observed that the notion of arbitrariness "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". Thus, the request to have one's change of name recognised can only be refused on grounds that are reasonable in the specific circumstances of the case.

10.5 In the present case, the authors' request for recognition of the change of their first names to Hindu names in order to pursue their religious studies had been granted in 1986. The State party based its refusal of the request also to change their surnames on the grounds that the authors had not shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not 'Dutch sounding'. The Committee finds the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the instant case the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 17 of the Covenant.

12. Pursuant to article 2 of the Covenant, the State party is under an obligation to

provide Mr. Aurik and Mr. Coeriel with an appropriate remedy and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future.

13. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's Views.

APPENDIX

Individual Opinions concerning the Committee's Views

1. Individual opinion by Mr. Nisuke Ando (dissenting)

I do not share the State party's contention that, in examining a request to change one's family name, elements such as the name's "religious connotations" or "non-Dutch sounding" intonation should be taken into consideration. However, I am unable to concur with the Committee's Views on this case for the following three reasons:

(1) Despite the authors' allegation that the requested change of the authors' family name is an essential condition for them to practice as Hindu priest, the State party argues that it has not been established that the authors cannot follow the desired religious education without the change of surname (see paragraph 9.5), and apparently, on the basis of that argument, the authors' claim has been rejected by the European Commission of Human Rights. Since the Committee is not in the possession of any information other than the authors' allegation for the purpose of ascertaining the relevant facts, I cannot conclude that the change of their family names is an essential condition for them to practice as Hindu priests.

(2) Article 18 of the Covenant protects the right to freedom of religion and article 17 guarantees everyone's right to the protection of the law against "arbitrary or unlawful interference with his privacy". However, in my opinion, it may be doubted whether the right to the protection of one's privacy combined with the freedom of religion automatically entails "the right to change one's family name". Surnames carry important social and legal functions to ascertain one's identity for various purposes such as social security, insurance, license, marriage, inheritance, election and voting, passport, tax, police and public records, and so on. In fact, the Committee recognizes that "the regulation of surnames and the change thereof was essentially a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18" (see paragraph 6.1). Moreover, it is not impossible to argue that the request to change one's family name is a form of manifestation of one's religion, which is subject to the restrictions enumerated in paragraph 3 of article 18.

(3) I do not consider that a family name belongs to an individual person alone, whose privacy is protected under article 17. In the Western society a family name may be regarded only as an element to ascertain one's identity, thus replaceable with other means of identification such as a number or a cipher. However, in other parts of the world, names have a variety of social, historical and cultural implications, and people do attach certain values to their names. This is particularly true with family names. Thus, if a member of a family changes his or her family name, it is likely to affect other members of the family as well as values attached thereto. Therefore, it is difficult for me to conclude that the family name of a person belongs to the exclusive sphere of privacy which is protected under article 17.

Nisuke Ando

2. Individual opinion by Mr. Kurt Herndl (dissenting)

I regret that I am unable to concur in the Committee's finding that by refusing to grant the authors a change of surname, the Dutch authorities breached article 17 of the Covenant.

(a) The States party's action seen from the general content and scope of article 17

Article 17 is one of the more enigmatic provisions of the Covenant. In particular, the term "privacy" would seem to be open to interpretation. What does privacy really mean?

In his essay on "Global protection of Human Rights - Civil Rights" Lillich calls privacy "a concept to date so amorphous as to preclude its acceptance into customary international law".[8] He adds, however, that in determining the meaning of privacy stricto sensu limited help can be obtained from European Convention practice. And there he mentions that i.a. "the use of name" was suggested as being part of the concept of privacy. This is, by the way, a quote taken from Jacobs, who with reference to the similar provision of the European Convention (article 8) asserts that "the organs of the Convention have not developed the concept of privacy".[9]

What is true for the European Convention is equally true for the Covenant. In his commentary on the Covenant Nowak states that article 17 was the subject of virtually no debate during its drafting and that the case law on individual communications is of no assistance in ascertaining the exact meaning of the word.[10]

It is therefore not without reason that the State party argues that article 17 would not necessarily cover the right to change one's surname (see para. 7.1 of the Views).

The Committee itself has not really clarified the notion of privacy either in its General Comment on article 17 where it actually refrains from defining that notion. In its General Comment the Committee attempts to define all the other terms used in article 17 such as "family", "home", "unlawful" and "arbitrary". It further refers to the protection of personal "honour" and "reputation" also mentioned in article 17, but it leaves open the definition of the main right enshrined in that article, i.e. the right to "privacy". While it is true that the Committee, in its General Comment, refers in various instances to "private life" and gives examples of cases in which States must refrain from interfering with specific aspects of private life, the question whether the name of a person is indeed protected by article 17 and, in particular, whether in addition there is a right to change one's name, is not brought up at all in the General Comment.

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[8] Richard B. Lillich, Civil Rights, in: Human Rights in International Law, Legal and Policy Issues, ed. Th. Meron (1984), p. 148.

[9] Francis G. Jacobs, The European Convention on Human Rights (1975), p. 126.

[10] Nowak, CCPR Commentary (1993), p.294, section 15.

I raise the above issues to demonstrate that the Committee is not really on safe legal ground in interpretating article 17 as it does in the present decision. I do, however, concur with the view that one's name is an important part of one's identity, the protection of which is central to article 17. Nowak is therefore correct in saying that privacy protects the special, individual qualities of human existence and a person's identity. Identity obviously includes one's name.[11]

What is, therefore, protected by article 17, is an individual's name and not necessarily the individual's desire to change his/her name at whim. The Committee recognizes this, albeit indirectly, in its own decision. The example it refers to in order to illustrate a possible case of State interference with individuals' rights under article 17 in contravention of that article is : "... if a State were to compel all foreigners to change their surnames.... "'(see para. 10.2 of the Views). This view is correct, but obviously cannot have a bearing on a case where a State - for reasons of generally applied public policy and in order to protect the existing name of individuals - refuses to allow a change of name requested by an individual.

Nevertheless, it can be argued that it would be appropriate to assume that the term "privacy" inasmuch as it covers, for the purpose of appropriate protection, an individual's name as part of his/her identity, also covers the right to change that name. In that regard one must have a closer look at the "Guidelines for the change of surname" published in the Netherlands Government Gazette in 1990 and applied in the Netherlands as common policy. The Dutch policy is, as a matter of principle, based on the premise that a person should keep the name which he/she acquires at birth in order to maintain legal and social stability (see para. 9.1, last sentence, of the Views). As such, this policy can hardly be seen as violating article 17. On the contrary, it is protective of acquired rights, such as the right to a certain name, and would seem to be very much in line with the precepts of article 17.

A change of name, according to the Guidelines, will be granted when the current name is a) indecent, b) ridiculous, c) so common that it has lost its distinctive character and d) not Dutch sounding. None of these grounds was invoked by the authors when they asked for authorization to change their surnames.

In accordance with the Guidelines a change of name can also be granted "in exceptional cases", for instance "in cases where the denial of the change of surname would threaten the applicant's mental or physical well-being" or "in cases where the denial would be unreasonable, taking into account the interests of both the applicant and the State" (see para. 9.2 of the Views). As the authors apparently could not show such "exceptional circumstances" in the course of the proceedings before the national authorities, their request was denied. Their assertion that they needed the name-change to become Hindu priests was apparently not substantiated (see the reasoning given by the Council of State in its decision of 17 October 1990, para. 2.3, last sentence, of the Views; see also the inadmissibility decision of the European Commission of Human Rights of 2 July 1992, where the European Commission held that the authors had not established that their religious studies would be impeded by the refusal to modify their surnames; para. 2.4, last sentence, of the Views). Nor can requirements imposed by Indian Hindu leaders be attributed to the Dutch authorities, as confirmed by the Committee in the present case in the framework of its decision on admissibility. There it examined the present communication under the angle of article 18 of the Covenant and came to the conclusion that "a State party to the Covenant cannot be held accountable for restrictions placed upon the exercise of religious offices by religious leaders in another country" (see para. 6.1 of the Views).

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[11] Nowak, loc. cit., p. 294, section 17.

The request for a change of name was, therefore, legitimately turned down as the authors could not show the Dutch authorities "exceptional circumstances" as required by law. The refusal cannot be seen as a violation of article 17. To hold otherwise would be tantamount to recognizing that an individual has an almost absolute right to have his/her name changed on request and at whim. For such a view, in my opinion, one can find no basis in the Covenant.

(b) The State party's action seen from the viewpoint of the criteria for permissible (State) interference in rights protected by article 17.

On the assumption that there exists a right of the individual to change his/her name, the question of the extent to which "interference" with that right is still permissible, has to be examined (and is, indeed, addressed by the Committee in the present Views).

What then are the criteria laid down for (State) interference? They are two and only two. Article 17 prohibits arbitrary or unlawful interference with one's privacy.

It is obvious that the decision of the Dutch authorities not to grant a change of name cannot per se be regarded as constituting "arbitrary or unlawful" interference with the authors' rights under article 17. The decision is based on the law applicable in the Netherlands. Hence it is not unlawful. The Committee itself says so (see para. 10.3 of the Views). The conditions under which a change of name will be authorized in the Netherlands are laid down in generally applicable and published "Guidelines for the change of surname" which, in themselves, are not manifestly arbitrary. These Guidelines have been applied in the present case, and there is no indication that they were applied in a discriminatory fashion. Hence it is equally difficult to call the decision arbitrary. The Committee does so, however, "in the circumstances of the present case" (see para. 10.5 of the Views). To arrive at that finding the Committee introduces a new notion - that of "reasonableness". It finds "the grounds for limiting the authors' rights under article 17 not to be reasonable" (see para. 10.5 of the Views).

The Committee thus attempts to expand the scope of article 17 by adding an element which is not part of that article. The only argument the Committee can adduce in this context is a simple reference (renvoi) to its own General Comment on article 17 where it stated that "even interference provided by law ... should be, in any event, reasonable in the particular circumstances". It is difficult for me to go along with this argumentation and to base on such argumentation a finding that a State party violated this specific provision of the Covenant.

Kurt Herndl

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

E. Communications Nos. 464/1991 & 482/1991; G. Peart & A. Peart v. Jamaica (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by:	Garfield Peart and Andrew Peart [represented by counsel]
Victims:	The authors
State party:	Jamaica
Date of communications:	17 July 1991 and 12 November 1991 (initial submissions)
Date of decisions on admissibility:	17 March 1994 and 19 March 1993

A. Decision to deal jointly with two communications

The Human Rights Committee,

Considering that communications Nos. 464/1991 and 482/1991 refer to closely related events affecting the authors,

Considering further that the two communications can appropriately be dealt with together,

1. Decides, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with these communications;

2. Further decides that this decision shall be communicated to the State party and the authors of the communications.

B. Views of the Human Rights Committee

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of communications Nos. 464/1991 and 482/1991, submitted to the Human Rights Committee by Messrs. Garfield Peart and Andrew Peart under the Optional Protocol to the International Covenant on Civil and Political Rights, Having taken into account all written information made available to it by the authors of the communications, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communications are Garfield and Andrew Peart, Jamaican citizens, at the time of submission of the communications awaiting execution at St. Catherine District Prison, Jamaica[12]. They claim to be victims of a violation by Jamaica of articles 2, 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors:

2.1 Andrew Peart was arrested on 14 July 1986 and charged with the murder, on 24 June 1986, of one Derrick Griffiths. Garfield Peart was arrested on 5 March 1987, in connection with the same murder. On 26 January 1988, after a trial lasting six days, the two brothers were convicted and sentenced to death in the Home Circuit Court of Kingston. The Court of Appeal dismissed their appeal on 18 October 1988. On 6 June 1991, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal. In December 1992, the authors' offence was classified as capital murder under section 7 of the Offences Against the Person (Amendment) Act 1992.

2.2 During the trial, the principal witness for the prosecution, Lowell Walsh, who at the time of the trial was 15 years old, testified that he had been watching a bingo game, around 9 p.m. on 24 June 1986. Among those present was the deceased. According to Walsh, Andrew came up to the group and called Griffiths. Griffiths, Walsh and another person, Horace Walker, together with Andrew then went to the latter's house. On arrival there, Walsh testified that he saw Garfield, whom he had known since childhood, sitting outside in the yard. It was night, and there was no lighting. He then witnessed what appeared to be an ambush; an armed man told Griffiths not to move, Andrew wrestled Griffiths to the ground, while Garfield threatened him with a gun. Walsh and Horace ran indoors to hide. Walsh testified that he heard gunshots and a voice saying "make sure he is dead". Walsh was then discovered by Andrew, who tied him up and threatened him. During a further incident between the two brothers and a newcomer, Walsh managed to escape.

2.3 The authors' defence was based on alibi. Upon his arrest, Garfield had immediately denied involvement and said that he had been at the cinema with friends when the incident took place. At the trial, he made an unsworn statement from the dock, repeating what he had told the arresting officer. He added that, while at the cinema, he had received a message from his child's mother that a shooting had taken place at his house. His alibi was supported by the sworn evidence of Claudette Brown, who said that she had been with the author at the cinema, and by Pamela Walker, who confirmed having given the message to the author at the cinema. In an unsworn statement from the dock, Andrew contended that, on the night of the murder, he was in the company of his girlfriend until 11 p.m., and that he had been framed.

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[12] On 18 April 1995, the authors' death sentences were commuted.

The complaint:

3.1 The authors claim that the trial against them was unfair. They point out that they were convicted upon the uncorroborated evidence given by Walsh. They submit that the trial transcript contains a suggestion that the other eyewitness, Walker, was not called because his evidence would not have supported that of Walsh. It is submitted that Walsh made a written statement to the police on the night of the incident which contained material discrepancies from the evidence which he gave at the trial. This statement was not released to the defence, even though under Jamaican law the prosecutor is obliged to provide the defence with a copy of any such statement. During the trial, the authors' lawyer applied to see the original statement, but the judge refused the application. A copy of the statement first came into the possession of the authors' counsel in February 1991. In the statement, Walsh does not identify Garfield as one of the attackers, and mentions another person as the one who shot Griffiths. It is submitted that without hearing evidence as to the contents of the statement the jury was not in a position to give a fair and proper verdict.

3.2 The authors further claim that they were not put on an identification parade, although they had asked for one, and that the judge should therefore have disallowed the dock identification made by Walsh. It is stated that Walsh may have been mistaken in his identification of Garfield as being present because he knew that he lived at the premises.

3.3 The authors further claim that the judge was not impartial, but biased in favour of the prosecution. In this context, it is said that the judge allowed the jury to remain in Court during a submission by Garfield's lawyer of "no case to answer", and the judge then dismissed that submission in the presence of the jury. It is submitted that the jury thereby heard weaknesses and inconsistencies in the arguments which should have been heard by the judge alone, thus prejudicing the jury against the authors.

3.4 The authors also claim that the judge's instructions to the jury were inadequate. In particular, it is alleged that the judge did not give proper instructions with regard to the evaluation of the identification evidence. It is stated that the judge failed to draw the jury's attention to the evidence, given during the trial by the investigating policeman, that it was dark that night, that he needed a lamp to see at the premises, and that, in order to make out a man holding a gun in his hand, he would have had to have been very close. In this connection, it is stated that the jury could at first not agree upon a verdict in respect of Garfield and asked for a further direction from the judge as to whether, if they believed that Garfield was present at the premises, they were obliged to come back with a guilty verdict. The judge then simply reminded them of the evidence given by Walsh, without pointing out its weaknesses.

3.5 The authors further claim that they did not have adequate time and facilities for the preparation of their defence and that they did not have the opportunity to examine or have examined the witnesses against them. It is further contended that the failure to obtain the attendance of an expert witness from the Meteorological Office to give evidence rendered the trial unfair. It is submitted that evidence as to the state of the moon on the night of the incident would have assisted the court in deciding how clearly Walsh could have seen the incident.

3.6 Andrew Peart complains that prison officers were present during an interview with his lawyer. This is said to be a breach of the right to unimpeded access to a lawyer.

3.7 Garfield Peart claims that he has been arbitrarily deprived of his liberty, in violation of article 9 of the Covenant, because he was not given a fair trial and has been kept in custody without release on bail.

3.8 Andrew Peart alleges violations of articles 9 and 14, paragraph 3(c), of the Covenant, on account of the delays in the judicial proceedings in his case. Thus, he was arrested on 14 July 1986, was not brought before an examining magistrate until 5 March 1987, and was not tried until the end of January 1988. It is submitted that a delay of 18 months between arrest and trial is unreasonable. It is submitted that similar delays occurred between the dismissal of the authors' appeal and the refusal of leave to appeal by the Judicial Committee, which is mainly attributable to the Jamaican judicial authorities; counsel explains that it was difficult to obtain copies of the deposition and the original statement of Walsh.

3.9 The authors also claim that they are victims of a violation of article 6 of the Covenant, since they have been sentenced to death following a trial which was not in accordance with the provisions of the Covenant. In this connection, reference is made to the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty contained in the annex to Economic and Social Council resolution 1984/50.

3.10 Garfield Peart further claims that his prolonged detention on death row, under degrading conditions, is in violation of articles 7 and 10 of the Covenant. Both authors submit that the conditions in St. Catherine District Prison are hard and inhuman and that they are not being offered treatment aimed at reformation and rehabilitation. It appears from a report prepared by a non-governmental organization that Andrew was injured by prison warders during the riots of May 1990. Garfield refers to an incident on 4 May 1993 when he was badly beaten during the course of an extensive search of the prison, allegedly because his brother Andrew was a witness in a murder case involving some senior warders. All his personal belongings were destroyed. Upon indication of a prison warder, a soldier beat him with a metal detector on his testicle. Later he was taken to the sick bay and given pain killers, but no doctor came to see him. He reported the incident to the acting Superintendent, who, however, disclaimed responsibility. His counsel, in September 1993, wrote to the Jamaican Commissioner of Police, also to no avail. The author states that he has exhausted all domestic remedies in this respect and claims that the remedies of filing a complaint with the Superintendent, the Ombudsman or the Prison Visiting Committee are not effective.

The State party's observations on admissibility and authors' comments thereon:

4.1 The State party argued that the communications were inadmissible on the grounds of failure to exhaust domestic remedies. The State party argued that it was open to the authors to seek redress for the alleged violations of their rights by way of a constitutional motion.

4.2 As regards the authors' claims under article 10 of the Covenant, the State party noted that the authors had not given any explanation for their contention that the available remedies are not effective and it submitted that the authors had not shown that they had attempted to exhaust domestic remedies in this respect. In addition, the State party argued that the authors also could bring a civil action in order to obtain damages for assault and battery and destruction of property. Moreover, the State party indicated that it was in the process of investigating the incident during which Andrew Peart was injured.

5.1 In their comments on the State party's submission, the authors further stated that they had no means to retain counsel and that legal aid is not made available either for constitutional motions or for civil actions, and that for this reason said remedies were not available to them. As regards the constitutional motion, the authors further referred to the Committee's jurisprudence that a constitutional motion is not an effective remedy.[13] Moreover, the authors claimed that, even if the constitutional motion were an available remedy, it would entail an unreasonable prolongation of the application of domestic remedies.

5.2 Garfield Peart explained that in May 1993, he filed a further petition for leave to appeal on the grounds that his continued detention on death row, where he had already been for over five years, constituted cruel and inhuman treatment, and that therefore the death sentence against him should not be executed.

The Committee's admissibility decisions:

6.1 During its 47th and 50th sessions, the Committee considered the admissibility of the communications.

6.2 As regards the State party's argument that a constitutional remedy was still open to the authors, the Committee recalled its jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant cases, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol.

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[13] Reference is made to the Committee's decisions in communications No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, and No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991.

6.3 The Committee considered inadmissible the part of the authors' claims which related to the instructions given by the judge to the jury with regard to the evaluation of the identification evidence. The Committee reiterated that it was, in principle, for the appellate courts of States parties, and not for the Committee, to review specific instructions to the jury by the judge, unless it was clear that the instructions were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligations of impartiality. The material before the Committee did not show that the judge's instructions to the jury in the instant case suffered from such defects.

6.4 The Committee further considered that the authors had failed to substantiate, for purposes of admissibility, their claim that the judge was not impartial and their claim that they did not have adequate time and facilities for the preparation of the defence and no opportunity to cross-examine the witnesses against him. In this context, the Committee noted from the trial transcript that the authors' counsel who represented them during the trial and at the appeal, had at no time raised objections and had in fact extensively cross-examined the main prosecution witness.

6.5 The Committee considered that Garfield Peart had not exhausted domestic remedies with regard to his claim that his prolonged detention on death row violated articles 7 and 10 of the Covenant. That part of the communication was therefore inadmissible under article 5, paragraph 2(b), of the Covenant.

6.6 With regard to Garfield Peart's claim that his continued detention was arbitrary and in violation of article 9 of the Covenant, the Committee noted that he was arrested and charged with the offence of murder, and subsequently was brought to trial, convicted and sentenced. It considered that the author could not claim that he was a victim of a violation of article 9 of the Covenant, and this part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the failure to make available to the defence the content of Walsh's original statement, as well as the unavailability of a material defence witness at the trial might raise issues under article 14, paragraphs 1 and 3(e), and that the circumstances in detention might raise issues under articles 7 and 10, which should be examined on the merits. The Committee further considered that Andrew Peart's communication might raise issues under article 9, paragraph 3, and that his claim that he did not have unimpeded access to his lawyer should be examined on the merits.

7. Consequently, the Human Rights Committee decided that the communications were admissible in as much as they appeared to raise issues under articles 7, 10 and 14, paragraphs 1 and 3(e), of the Covenant, in relation to both authors, and under article 9, paragraph 3, in relation to Andrew Peart.

Post admissibility submissions from the parties:

8. By submission of 20 January 1994, counsel for Andrew Peart states that warders had beaten Andrew with a metal detector on 4 May 1993. Afterwards he was passing blood in his urine and suffering from shoulder injuries, but he did not receive medical

treatment. He further states that he was locked in his cell without water until Friday 7 May 1993. Counsel also submits that Andrew has been receiving death threats from warders, allegedly because he testified against one of them before the Court after the death of an inmate in 1989. Counsel provides copies of letters sent to the Parliamentary Ombudsman, the Solicitor General, the Director of Correctional Services and the Minister of Justice and National Security. In reply, counsel received information that the complaint was being investigated by the Inspectorate General of the Ministry of National Security and Justice.

9.1 By submission of 11 November 1994 concerning Garfield Peart's communication, the State party reiterates its opinion that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author complained about his ill-treatment in prison to the Commissioner of Police, who would have little or no jurisdiction in a matter of this kind. It is submitted that the author should have sought the assistance of the Office of the Ombudsman or should have made a formal complaint to the prison authorities. The State party further states that it has asked the Inspectorate General to investigate the allegations.

9.2 With regard to the claim that article 14, paragraph 1, has been violated because counsel was not allowed to see the original statement of Walsh, the State party submits that there is a duty on the part of Crown Counsel under Jamaican law to inform the defence if there is a material discrepancy between the content of a statement given by a witness to the police and the evidence given by a witness to the defence. The duty to show the statement to the defence depends on the circumstances. The State party submits that under article 17 of the Evidence Act, defence counsel may invite a trial judge to exercise his discretion to require the production of the statement.

9.3 In the present case, the trial judge declined to exercise his discretion. In the opinion of the State party this does not involve a breach of article 14 of the Covenant. Furthermore, the State party submits that the appropriate body for reviewing the exercise of the judge's discretion is the Court of Appeal, which in the present case did not take the view that the judge's discretion was wrongly exercised, and neither did the Privy Council.

9.4 With regard to the alleged breach of article 14, paragraph 3(e), the State party argues that, unless the State by act or omission was responsible for the witness not being available, the State cannot be held accountable for the non-availability of a defence witness.

10.1 In his comments, dated 20 February 1995, counsel for Garfield Peart argues that the Office of the Ombudsman is not a competent authority within the terms of article 2, paragraph 3(b), of the Covenant. Furthermore, counsel points out that in reply to the complaint made by the author about his treatment in prison, the Commissioner of Police acknowledged receipt of the complaints and advised him that the matter was being referred to the Commissioner of Correctional Services for appropriate action. On 27 June 1994, counsel sent a further letter to the Commissioner of Corrections, but no response has been received to date.

10.2 Counsel maintains that there was a material discrepancy between the original statement of Walsh and his evidence in court of which the defence was not advised and that the failure to produce the original statement resulted in a miscarriage of justice.

Issues and proceedings before the Committee:

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee has noted the State party's argument that the claim with regard to the treatment suffered by Garfield Peart in prison is inadmissible because of failure to exhaust domestic remedies. The Committee has also noted that the author had complained to the acting Superintendent, and that his counsel had made a complaint to the Commissioner of Police and was subsequently informed that the complaint was referred to the Commissioner of Correctional Services for appropriate action. In the circumstances, the Committee considers that the author and his counsel have shown due diligence in the pursuit of domestic remedies and that there is no reason to review the Committee's decision on admissibility.

11.3 With regard to the authors' claim that the unavailability of the expert witness from the Meteorological Office constitutes a violation of article 14 of the Covenant, the Committee notes that it appears from the trial transcript that the defence had contacted the witness but had not secured his presence in court, and that, following a brief adjournment, the judge then ordered the Registrar to issue a subpoena for the witness and adjourned the trial. When the trial was resumed and the witness did not appear, counsel informed the judge that he would go ahead without the witness. In the circumstances, the Committee finds that the State party cannot be held accountable for the failure of the defence expert witness to appear.

11.4 With regard to the evidence given by the main witness for the prosecution, the Committee notes that it appears from the trial transcript that, during cross-examination by the defence, the witness admitted that he had made a written statement to the police on the night of the incident. Counsel then requested a copy of this statement, which the prosecution refused to give; the trial judge subsequently held that defence counsel had failed to put forward any reason why a copy of the statement should be provided. The trial proceeded without a copy of the statement being made available to the defence.

11.5 From the copy of the statement, which came into counsel's possession only after the Court of Appeal had rejected the appeal and after the initial petition for special leave to appeal to the Judicial Committee of the Privy Council had been submitted, it appears that the witness named another man as the one who shot the deceased, that he implicated Andrew Peart as having had a gun in his hand, and that he did not mention Garfield Peart's participation or presence during the killing. The Committee notes that the evidence of the only eye-witness produced at the trial was of primary importance in the absence of any corroborating evidence. The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants. The Committee finds therefore that the facts before it disclose a violation of article 14, paragraph 3(e), of the Covenant.

11.6 With regard to the authors' allegations about maltreatment on death row, the Committee notes that the State party has indicated that it would investigate the allegations, but that the results of the investigations have not been transmitted to the Committee. Due weight must therefore be given to the authors' allegations, to the extent that they are substantiated. The Committee notes that the authors have mentioned specific incidents, in May 1990 and May 1993, during which they were assaulted by prison warders or soldiers and, moreover, that Andrew Peart has been receiving death threats. In the Committee's view this amounts to cruel treatment within the meaning of article 7 of the Covenant and also entails a violation of article 10, paragraph 1.

11.7 Andrew Peart has further alleged that he did not have unimpeded access to his lawyer because prison officials were present during an interview. The Committee considers that the author has not substantiated in what way the mere presence of the officers hindered him in preparing his defence and notes in this context that no such claim was advanced before the local courts. The Committee concludes therefore that the facts before it do not disclose a violation of article 14 of the Covenant in this respect. The Committee further considers that the facts of the case do not disclose a violation of article 9.

11.8 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal."[14] In the present case, since the final sentence of death was passed without due respect for the requirement of fair trial, there has consequently also been a violation of article 6 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, and 14, paragraph 3(e), and consequently article 6, of the International Covenant on Civil and Political Rights.

13. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to make the prosecution witness' police statement available to the defence obstructed the defence in its cross-examination of the witness, in violation of article 14, paragraph 3(e), of the Covenant; thus, Garfield and Andrew Peart did not receive a fair trial within the meaning of the Covenant. Consequently, they are entitled,

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[14] See CCPR/C/21/Rev.1, page 7, paragraph 7.

under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The Committee has taken note of the commutation of the authors' death sentence, but it is of the view that in the circumstances of the case, the remedy should be the authors' release. The State party is under an obligation to ensure that similar violations do not occur in the future.

14. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

F. Communication No. 473/1991; Isadora Barroso v. Panama (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by:	Mrs. Isidora Barroso
Victim:	Her nephew, Mario Abel del Cid Gómez
State party:	Panama
Date of communication:	24 August 1991 (initial submission)
Date of decision on admissibility:	11 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of communication No. 473/1991 submitted to the Human Rights Committee by Mrs. Isidora Barroso on behalf of her nephew, Mario Abel del Cid Gómez, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Isidora Barroso, a Panamanian citizen currently domiciled in the United States of America. She submits the communication on behalf of her nephew, Mario Abel del Cid Gómez, a Panamanian citizen born in January 1949 and at the time of submission detained at a prison in Panama City. The author claims that her nephew is the victim of violations by Panama of articles 2; 9, paragraphs 3 to 5; and 14, paragraphs 2, 3, 6 and 7, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author:

2.1 Mario del Cid was arrested on 25 December 1989, several days after the intervention of United States troops in Panama. A career military officer, he had held the post of major in the Panamanian armed forces and allegedly turned himself in to United States troops. The author deduces from this that her nephew should have been treated as a prisoner of war, in accordance with the Geneva Conventions, and been accorded the appropriate treatment. On 31 January 1990, he was handed over to the new Government of Panama, which immediately placed him under arrest and brought charges against him on 1 February 1990.

2.2 Early in 1990, Mr. del Cid was publicly associated with the assassination, by a paramilitary group, of a doctor, Hugo Spadafora Franco. The author submits that this charge was wholly unfounded and based on the simple fact that her nephew had been present in the town of Concepción on 13 September 1985, when Mr. Spadafora's body was found. Mrs. Barroso, who qualifies Mr. Spadafora as a guerrillero, notes that newspaper reports stated that her nephew had been implicated in the death of Mr. Spadafora by one Colonel Diaz Herrera, who allegedly himself was implicated in the doctor's death and who has since obtained political asylum in Venezuela. The author observes that the legislature of Panama, by act deemed unconstitutional, nominated a special prosecutor to investigate Mr. Spadafora's death. The special prosecutor, it is submitted, has displayed a similarly biased attitude vis-à-vis Mr. del Cid.

2.3 On 17 January 1990, a request for habeas corpus was filed on behalf of Mr. del Cid, with a view to securing his release. It allegedly took the Government over one month to reply that it had no idea of Mr. del Cid's whereabouts, and that no charges were known to exist against him. His mother subsequently tried to visit him at the Fort Clayton Detention facility, where the authorities allegedly denied her access to her son. It is claimed that at Fort Clayton, Mr. del Cid was interrogated on a daily basis, in violation of the Geneva Conventions.

2.4 Since mid-1990, a number of unsuccessful requests for Mr. del Cid's release on bail have been filed by his lawyers. One habeas corpus request was granted by the Superior Tribunal (Tribunal Superior del Tercer Distrito Penal); the special prosecutor, however, appealed, and in August 1990, the Supreme Court reversed the release order. Since that date, the Superior Tribunal has not been willing to grant further requests for bail, for fear of coming into conflict with the Supreme Court's decision. In a letter dated 5 December 1992, Mrs. Barroso affirms that her nephew was "to be set free ... several months ago", but that again the prosecutor appealed the decision.

2.5 Besides the repeated denials of bail, the author claims that her nephew's trial has similarly been postponed on several occasions, for unexplained reasons. Late in 1992, she informed the Committee that her nephew's trial was set for February or March 1993; in April 1993, the court hearing had once again been postponed, according to her, to "June or July 1993". By letter dated 25 June 1993, Mrs. Barroso confirmed that the trial was scheduled to begin on 6 July 1993.

2.6 For Mrs. Barroso, her nephew was used by the Government of Panama as a scapegoat for various unfounded charges. She asserts, for example, that he was accused of being responsible for the disappearance of material worth US$ 35,000 donated by the Panama Canal Commission, and that the Government asked him to pay back $ 50,000 by way of compensation. She further contends that the State party's authorities restricted Mr. del Cid's contacts with members of his family, denying him for example the right to visit his dying mother.

2.7 Furthermore, in late 1991, his wife's telephone allegedly was disconnected without valid reason, and Mr. del Cid was unable to talk to his children for a prolonged period of time thereafter. According to Mrs. Barroso, all the charges against her nephew are fabricated. The author refers to what she perceives as the desire of the (then) Government to deny their rights to those individuals in detention who are associated in one way or another with the former regime of General Manuel Noriega.

2.8 By a letter of 26 September 1993, Mrs. Barroso indicates that her nephew was acquitted of the charges against him. She contends, however, that new charges against him have been formulated and are pending, as his acquittal caused considerable public protest. In the circumstances, she requests the Committee to continue consideration of the case.

The complaint:

3. It is claimed that the facts outlined above constitute violations of articles 9, paragraphs 3 to 5, and 14, paragraphs 2, 3, 6 and 7, of the Covenant. In particular, the author contends that her nephew was denied bail arbitrarily and contrary to article 9, paragraph 3, and that he has not been tried without undue delay, as required under article 14, paragraph 3(c). She finally asserts that the judicial authorities and particularly the office of the special prosecutor have done everything to portray her nephew as guilty, in violation of article 14, paragraph 2.

The State party's information and observations:

4.1 In its submission under rule 91, the State party submits that the author's allegations are unfounded, and that Mr. del Cid's procedural guarantees under Panamanian criminal law have been and are being observed.

4.2 The State party contends that there is no basis for the author's allegation of "political interventionism" in the judicial process, and adds that the investigations in the case have produced sufficient evidence about Mr. del Cid's involvement in the death of Mr. Spadafora and that, accordingly, Mr. del Cid's arrest and his detention without bail are compatible with article 9 of the Covenant.

4.3 According to the State party, Mr. del Cid's rights under the Criminal Code, the Code of Criminal Procedure, the Constitution of Panama and other applicable laws have been strictly observed. Such delays as may have occurred are merely attributable to the protracted and thorough investigatory process, the volume of documentary evidence, as well as the fact that apart from Mr. del Cid, nine other individuals were indicted in connection with the death of Mr. Spadafora.

4.4 Finally, the State party is adamant that the rights of the defence have been and are being observed, and that Mr. del Cid was represented, at all stages of the procedure, by competent lawyers.

The Committee's decision on admissibility:

5.1 During its forty-ninth session, the Committee considered the admissibility of the communication. It noted that Mr. del Cid was acquitted of the charges against him, upon conclusion of a trial which had started on 6 July 1993. It observed however that he had been detained for well over three and a half years without bail, and that the scheduled date for his trial had been postponed on several occasions. While the State party had pointed to the thoroughness of the investigations, it had failed to explain the delays in pre-trial and judicial proceedings. The Committee considered that a delay of over three and a half years between arrest and trial and acquittal justified the conclusion that the pursuit of domestic remedies had been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee considered that the author had sufficiently substantiated her allegations under articles 9 and 14 and, accordingly, on 11 October 1993, declared the case admissible in so far as it appeared to raise issues under articles 9 and 14 of the Covenant.

State party's observations on the merits and author's comments thereon:

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party reiterates that the author's rights under articles 9 and 14 were respected. It notes that in the trial against 14 ex-military officers accused of involvement in the death of Mr. Spadafora, Mr. del Cid was indicted on charges of participation in and having covered up the crime (partícipe y encubridor). In this case, he was acquitted by a decision which was notified to him on 7 September 1993.

6.2 The State party observes that separate proceedings, filed subsequent to those concerning the death of Mr. Spadafora, are currently before the Superior Tribunal (Tribunal Superior del Segundo Distrito Judicial), where Mr. del Cid faces charges of homicide together with seven other individuals, and notes that a summons to present himself in court (auto de llamamiento) was served on him on 28 July 1993. Mr. del Cid filed grounds of appeal and, according to the State party, the Second Chamber of the Supreme Court is now in the process of deciding on the appeal.

6.3 The State party reiterates that in the criminal proceedings against him, Mr. del Cid has benefited from legal assistance and had lawyers assigned to defend him at all stages of the proceedings.

6.4 The State party submits that it has no knowledge of other criminal charges against Mr. del Cid, with the exception of those mentioned in paragraph 6.2 above, which are related to the death of several individuals who, at the time of their death, were serving prison terms at the penitentiary on the island of Coiba, of which Mr. del Cid, at the material time, was the director.

7.1 In her comments, the author contends that the charges still pending against her nephew, related to his alleged activities as director of the Coiba Island penitentiary, are fabricated and based on false accusations. She submits, without providing further details, that these charges were dismissed at Penomene City, Panama, but that "someone appealed the case" to cause her nephew further harm.

7.2 The author argues that while her nephew was director of the Coiba Island penitentiary, "he was the only one who made it possible for family members of those detained to be able to visit". He allegedly also allowed the detainees to obtain "raw materials", so as to enable them to produce small objects and sell them. The author places confidence in the magistrate of the Second Chamber of the Supreme Court responsible for the case at the level of the Supreme Court (see para. 6.2 above).

Examination of the merits:

8.1 The Human Rights Committee has examined the communication in the light of all the submissions made by the parties. It bases its views on the following considerations. In so doing, it recalls that during its 53rd session, it had decided to seek certain clarifications from the State party, which were requested in a note dated 28 April 1995. No reply to this request for clarifications has been received from the State party.

8.2 The Committee has noted the author's claim that her nephew was arrested and detained arbitrarily, and that he was denied bail primarily out of "political motives". However, the material before the Committee does not reveal that Mr. del Cid was not detained on specific criminal charges; accordingly, his detention cannot be qualified as "arbitrary" within the meaning of article 9, paragraph 1. There is further no indication that Mr. del Cid was denied bail without a proper weighing, by the judicial authorities, of the possibility of releasing him on bail; accordingly, there is no basis for a finding of a violation of article 9, paragraph 3. Similar considerations apply to the alleged violation of article 9, paragraph 4: the Superior Tribunal did in fact review the lawfulness of Mr. del Cid's detention.

8.3 The author has alleged a violation of article 14, in particular of paragraphs 2, 3, 6 and 7. On the basis of the material before it, the Committee does not find that the presumption of innocence has been violated in the instant case as it relates to the death of Mr. Spadafora: no documentation has been provided which would corroborate the author's claim that the office of the special prosecutor was biased against Mr. del Cid and portrayed him as guilty ab initio: on the contrary, in the proceedings related to the death of Mr. Spadafora, Mr. del Cid was acquitted of the charges against him. Nor is there any indication that his rights under article 14, paragraph 3, were not respected: the State party's contention that he had access to legal advice throughout the proceedings has not been refuted by the author.

8.4 The Committee takes note of the State party's argument that the investigations were necessarily protracted and thorough, given the number of individuals indicted in the context of the assassination of Mr. Spadafora. The author has, on the contrary, pointed to the "political nature" of the proceedings and contends that they were unduly delayed, as her nephew was indicted on 1 February 1990 and not tried until the summer of 1993. The Committee further observes that the State party did not reply to its request of 28 April 1995 for further clarifications on the issue of the length of the proceedings against Mr. del Cid.

8.5 The Committee considers that a delay of over three and a half years between indictment and trial in the present case cannot be explained exclusively by a complex factual situation and protracted investigations. In cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible. The burden of proof that there are other factors which might have justified the delays in the present case lies with the State party. As the State party has not replied to the Committee's request for further clarifications on this issue, the Committee has no choice but to conclude that no such other factors did in fact exist, and that Mr. del Cid was not tried without "undue delay", contrary to article 14, paragraph 3(c), of the Covenant.

8.6 The Committee notes that the proceedings before the Superior Tribunal referred to in paragraphs 6.2 and 7.1 above, relating to Mr. del Cid's activities in the Coiba Island penitentiary, remain pending. As these proceedings were not part of the author's initial complaint and are not covered by the terms of the decision on admissibility of 11 October 1993, the Committee makes no finding in their respect.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 3(c), of the Covenant.

10. Under article 2, paragraph 3(a), of the Covenant, Mr. del Cid is entitled to an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

G. Communication No. 493/1992; Gerald J. Griffin v. Spain (Views adopted on 4 April 1995, fifty-third session)

Submitted by:	Gerald John Griffin
Victim:	The author
State party:	Spain
Date of communication:	13 January 1992 (initial submission)
Date of decision on admissibility:	11 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Having concluded its consideration of communication No. 493/1992 submitted to the Human Rights Committee by Gerald John Griffin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

Facts as submitted by the author

1. The author of the communication is Gerald John Griffin, a Canadian citizen born in 1948. At the time of submitting his communication, he was detained at a penitentiary at Vitoria, Spain. He claims to be the victim of violations by Spain of articles 7; 9, paragraphs 1 and 2; 10; 14; 17 and 26 of the International Covenant on Civil and Political Rights.

2.1 In March 1991, the author and an acquaintance, R. L., started a pleasure journey through Europe. Upon arrival in Amsterdam, they rented a camper. R. L. suggested paying the rent with the author's credit card, as his own account was limited, and said that he would later reimburse the author. In Amsterdam, R. L. introduced the author to another Canadian, I. G, with whom he went off to bars on several occasions, leaving the author behind. One day R. L. and I. G. returned with a different camper, claiming that the first one had broken down.

2.2 I. G. suggested meeting again at Ketama, Morocco, where they could stay at a friend's place. The author and R. L. then drove to Morocco, where they spent five days;

the camper was parked in a garage.

2.3 On 17 April 1991, on their way back to the Netherlands, the author and R. L. were arrested by the police of Melilla, Spain. It transpired that R. L., I. G. and his Moroccan friend had concealed 68 kilograms of hashish in the camper. R. L. allegedly confessed his guilt and told the police that the author was innocent. It is submitted that, during the interrogation, the police did not seek the assistance of an interpreter, although the author and R. L. did not speak Spanish and the investigating officers did not speak English. The statements were taken down in Spanish.

2.4 On 18 April 1991, the author and R. L. were brought before an examining magistrate. Upon entering the court room, the interpreter allegedly told the author that R. L. had confessed and had said that the author was innocent. The examining magistrate allegedly stated that if the author had no criminal record over the past five years, he would be released within a few days. The author admitted that, in 1971, he had been convicted for possession of 28 grams of hashish and sentenced to six months suspended imprisonment.

2.5 The author was incarcerated at Melilla. Through the mediation of a prisoner who spoke a little English, the author obtained the services of a barrister and a solicitor. He states that the barrister asked for large sums of money, promising on several occasions that she would return with all the documents pertaining to his case and with an interpreter, so as to prepare his defence in consultation with him. The author notes that she tricked him constantly, assuring him and his relatives that he would be released soon. In spite of her promises, she did not prepare his defence. In this context, the author adds that, two days before the start of the trial, she came to the prison, again without an interpreter. With the assistance of a prisoner who spoke broken English, she told the author to reply with "yes" or "no" to all questions posed during the trial.

2.6 On 28 October 1991, the author and R. L. were tried before the Audiencia Provincial (Sector de Malaga) at Melilla. The author states that the court interpreter spoke only a little English and translated into French, but that neither he nor R. L. had any substantial knowledge of French. The barrister, however, did not raise any objections. During the trial, the judge asked the author whether he had always been accompanying R. L. when he drove the camper. Owing to poor translation of the question, the author misunderstood it and answered in the affirmative.

2.7 The author was sentenced to imprisonment for eight years, four months and one day. He requested his barrister to appeal on his behalf; she first refused, then again requested a large sum of money, upon which the author filed a complaint against her with the bar (Colegio de Abogados) of Melilla.

2.8 On 26 November 1991, riots broke out in the prison of Melilla. Prisoners set fire to the patio and climbed on to the roof. The author explains that as he has a lame leg he could not climb up and, because the guards had locked the door to the main building, he was nearly caught in the fire. He states that, only because he helped to carry a man who appeared to suffer from a heart attack, he was allowed by the guards to leave the patio. After the police intervened with tear-gas and rubber bullets, and the prison authorities promised improvements in the conditions of detention, the situation calmed down. On 28 November 1991, the author was transferred to a prison at Seville.

2.9 On 10 January 1992, the author was informed that a legal aid lawyer had been assigned to him and that an appeal was being filed on his behalf. He states that he made numerous unsuccessful attempts to obtain information about the identity of the lawyer and the date of the hearing of the appeal. On 7 March 1992, he started a hunger strike to enforce his right to a fair trial. He was subsequently transferred to the infirmary of a prison at Malaga. At the end of June 1992, he learned from another lawyer that the Supreme Court had dismissed the appeal on 15 June 1992. According to the author, the Supreme Court did not give reasons for its decision.

2.10 The author states that his health is poor and that he suffers from extreme depressions because of his unfair treatment by the Spanish authorities. He lost 21 kg because of his hunger strike and developed pneumonia. In September 1992, he resumed eating, as his hunger strike had not had any effect upon the Spanish authorities.

2.11 Finally, the author submits that he has exhausted all available domestic remedies. In this context, he states that he wrote letters to several instances in Spain, including the Constitutional Court, the Ombudsman (Defensor del Pueblo), the judge and public prosecutor and the Prosecutor General (Fiscal General del Estado). The Constitutional Court reportedly replied that it was unable to assist him, but that his case would be passed on to the Prosecutor General. The latter never replied to the author's letters. The Ombudsman reportedly replied that he could not be of any assistance to him because he was awaiting trial. The author questions the effectiveness of this remedy, as the Ombudsman replied to an inmate of the prison that he was unable to assist him because he (the inmate) had already been sentenced. By a letter of 3 March 1992, the prosecutor informed the author that he would look into the claim of absence of a competent interpreter, but he never received any reply.

The complaint

3.1 The author claims that he has been subjected to cruel, inhuman and degrading treatment and punishment during his incarceration at the prison of Melilla. The living conditions in this prison are said to be "worse than those depicted in the film 'Midnight Express'"; a 500-year-old prison, virtually unchanged, infested with rats, lice, cockroaches and diseases; 30 persons per cell, among them old men, women, adolescents and an eight-month-old baby; no windows, but only steel bars open to the cold and the wind; high incidence of suicide, self-mutilation, violent fights and beatings; human faeces all over the floor as the toilet, a hole in the ground, was flowing over; sea water for showers and often for drink as well; urine-soaked blankets and mattresses to sleep on in spite of the fact that the supply rooms were full of new bed linen, clothes etc. He adds that he has learned that the prison has been "cleaned up" since the riots, but that he can provide the Committee with a list of witnesses and with a more detailed account of conditions and events in the said prison.

3.2 Concerning article 9, paragraphs 1 and 2, of the Covenant, the author claims that he was arbitrarily arrested and detained since there was no evidence against him. He submits that some people he met in prison and who were charged with a similar offence were either released or acquitted, whereas he was detained in spite of R. L.'s confession and the promise of the examining magistrate to release him if he had no criminal record. He further contends that, as there was no interpreter present at the time of their arrest, he was not informed of the reasons for his arrest and of the charges against him.

3.3 The author claims that, while awaiting trial, he was detained in a cell together with persons convicted of murder, rape, drug trafficking, armed robbery, etc. According to him, there is no distinction between convicted and unconvicted prisoners in Spain. Furthermore, he claims that the Spanish penitentiary system does not provide facilities for reformation and social rehabilitation. In this context, he submits that he, together with an inmate at the Melilla prison, tried to teach reading and writing to some prisoners, but that the prison director did not allow them to do so. Moreover, the prison authorities have ignored all his requests for Spanish grammar books and a dictionary. All this is said to constitute a violation of article 10.

3.4 The author claims that his rights under article 14 of the Covenant have been violated. With regard to unfair trial, he submits that the trial lasted only 10 minutes, that neither he nor R. L. understood what was going on, and that he was not allowed to give evidence or to defend himself. He points out that neither the judge nor the barrister objected to the incompetence of the interpreter, and that his conviction might be based on the discrepancy between his original statement to the examining magistrate (namely, that he was often left behind by R. L. and the other Canadian and that they once returned with a different camper) and his reply at the trial (his affirmation that he was always accompanying R. L. when the latter drove the camper). The author reiterates that there is no evidence against him. In support of his allegations, he encloses two affidavits of R. L, dated 28 January 1992, concerning the author's innocence and the inadequacy of the interpreter. The author further claims that he has been sentenced to a longer term of imprisonment than Spanish nationals normally are in similar cases.

3.5 As to the preparation of his defence, the author affirms that he has never received a single document pertaining to his case. He notes that R. L. had admitted that he owned the camper, that in Canada he had prepared its roof to conceal the drugs, that it was then shipped to the Netherlands where he and I. G. forged the papers and licence plates using those of the camper rented in Amsterdam, and that he had invited the author to join him on the trip merely to make it appear less conspicuous. The author contends that the barrister did not make any efforts to obtain evidence about the veracity of R. L.'s confession, and that she never interviewed them in the presence of an interpreter.

3.6 With regard to the appeal, the author submits that the lawyer assigned to him never sought to contact him to discuss the case. It was not until September 1992, three months after the dismissal of the appeal, that he learned the name of the representative. Furthermore, the author submits that he was denied the opportunity to defend himself on appeal, as the hearing was held in his absence.

3.7 The author further contends that the Spanish authorities have interfered with his mail, in violation of article 17. He submits that on several occasions letters addressed to him by friends, family and his lawyer in Canada were either returned to the sender or simply disappeared.

3.8 Finally, the author claims that he is discriminated against by the Spanish authorities. In this context, he submits that he has not been treated in the same manner before the courts as Spanish nationals are treated, for example with regard to facilities to prepare the defence or length of term of imprisonment. He further submits that the prison authorities have refused to provide him with work (which makes it possible to have the sentence reduced by one day for every day of work), whereas Spanish prisoners are able to obtain work upon request.

State party's admissibility information and observations and author's comments

4.1 In its submissions dated 28 October 1992 and 22 March 1993, the State party argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, as the author has failed to apply for amparo before the Constitutional Court of Spain.

4.2 With regard to the claims of ill-treatment in prison, the State party refers to the Ombudsman's 1991 report on ill-treatment in Spanish prisons. It highlights the efforts made by the Director of Penitentiary Affairs, as well as by the prison officials, to eliminate instances of ill-treatment in prison. The Ombudsman points out that his conclusions are based not only on complaints received or periodic visits to the penitentiaries, but also on the results of investigations into such complaints. He reports that, in 1991, his office received only a few sufficiently substantiated complaints about ill-treatment; two of them were immediately investigated by the penitentiary administration. He concludes that the Director of Penitentiary Affairs has thoroughly cooperated in the investigation of complaints transmitted to his office by the Ombudsman, and that the penitentiary administration has always performed its duty rapidly and efficiently, by investigating the events complained of, adopting adequate remedies wherever the allegations could be proved, and adopting protective measures for disciplinary proceedings. The State party submits that the Ombudsman received several letters from the author, that each letter was examined by the Ombudsman, and that on each occasion the author was informed about the Ombudsman's findings.

4.3 The State party notes that, on 31 March 1992, the author was transferred to a prison at Malaga, where he received the necessary medical attention, and where he had numerous interviews with the sociologist and legal adviser, who informed him on the possibilities of his defence. Furthermore, the medical report indicates that the author did not begin a genuine hunger strike but limited himself to selective nutrition, as a result of which he lost 7 kg, and that no serious complications arose. Finally, the State party points out that the author did not initiate proceedings with regard to the alleged inhuman conditions of detention.

4.4 With regard to the author's remaining complaints, the State party submits copies of the relevant documents and argues that:

> There was sufficient evidence against the accused for the police to arrest and detain them. In this context, the State party refers to the documents and

photographs relating to the quantity of drugs found and their value and to the camper.

- Neither the author nor R. L. made any statements to the police. When arrested, they were informed of the charges against them and of their rights, under article 520 of the Code of Criminal Procedure. Although a lawyer was assigned to them, the author and R. L. indicated that they did not want to make any statements in the absence of an interpreter.

- While represented by a lawyer and assisted by an interpreter, the author made the following deposition during the preliminary hearing: "that he had no knowledge of the drugs which were hidden in the camper, that he was travelling with his friend, that they made a stop at Ketama where they stayed for five days, that the camper was parked in a garage near to the house, the camper from the other Canadian whom they had met in Amsterdam".

- R. L.'s deposition reads as follows: "that he went to Morocco with the intention to pick up the hashish and to transport it to Canada, that a third person had contacted him for this purpose, that he did not know this person's name, ..., that Gerald John Griffin did not know of the hashish, that he only accompanied him for the purpose of tourism, that they spent seven days in Ketama, doing sightseeing during those seven days, that they were lodged at the house of a Moroccan friend, who was a friend of his Canadian friend (I. G.), ...".

- Upon inquiry, the examining magistrate was informed by Interpol in Canada that the author had a prior criminal record for holding and distributing narcotics, for which he had been sentenced to six months' (suspended) imprisonment.

- Likewise, a letter, dated 9 October 1991, from the Solicitor General of Canada, addressed to the author's counsel in Canada, belonged to the documents bearing on the case; in that letter, counsel was informed that the author had been granted a pardon under the provisions of the Criminal Records Act.

- According to forensic experts at Melilla, drug traffickers generally claim that one of them is innocent. In evaluating the evidence in drug trafficking offences, the courts do not only consider the statements made by the accused, but also the quantity of drugs involved and the hiding-place.

- The alleged inadequate preparation and conduct of the author's defence at the trial cannot be attributed to the State party, as the barrister was privately retained.

- Besides, the State party submits, the barrister's professional skills are reflected in her letter of 22 November 1991, addressed to the Colegio de Abogados of Melilla. In that letter, the barrister states that, on 30 October 1991, she informed the author of his sentence, and of the possibility of appealing to the Supreme Court by way of request for cassation, either with the assistance of a solicitor and barrister assigned to him by the judicial authorities, or by retaining them privately. The author instructed her to prepare and file a petition for leave to appeal, which she set out to do on 2 November 1991. However, on 8 November 1991, the author informed her of his decision to retain another lawyer for the purpose of the appeal. By registered letter of 11 November 1991, she pointed out to the author that he had to grant power of attorney to any lawyer retained by him. She further informed him that she would forward all documents in his case to his representatives, once he had provided her with their names and addresses, and once he had paid the outstanding fees. On 21 November 1991, she was notified that the Audiencia de Malaga considered that the appeal had been prepared and that it summoned the defence to appear before the Supreme Court in 15 days. She then immediately called the author and again pointed out to him the urgency of empowering the solicitor and barrister who would represent him. Upon contacting the barrister who, according to the author, had agreed to represent him, she was told that he was not in charge of the appeal.

- The State party points out that, subsequently, the author's barrister, concerned about the expiration of the statute of limitations and about the fact that the author had not taken any measures to secure legal representation, requested the Colegio to intervene.

- Upon instructions of the Colegio, the author's solicitor requested the Supreme Court, on 29 November 1991, to assign legal assistance to the author and to stay the proceedings in the intervening period. The State party submits that it was only after this intervention that the author himself requested legal aid.

- Both the accused made statements during the trial, while assisted by an interpreter and a lawyer. No complaints were ever received about the competence of the court interpreter who is assigned to the tribunals of Melilla.

- It is noted that the judge asked R. L. and not the author whether he was always accompanied by the latter, whereupon R. L. answered "that the author accompanied him during the whole trip". According to the State party, the judges concerned never directed any question to the author.

- On 15 June 1992, the Supreme Court dismissed the author's appeal; the written judgement was issued on 3 July 1992. The State party submits that the author was adequately represented on appeal; in this context, it refers to the grounds of appeal. It further submits that the barrister who was assigned to the author and who filed the grounds of appeal received a telephone call from another lawyer, who requested permission, on behalf of the Canadian Embassy, to conduct the author's defence before the Supreme Court. By a letter of 15 June 1992, the barrister granted permission.

4.5 The State party reiterates that the author has not applied for amparo before the Constitutional Court, although it was adequately explained to him how to proceed.

5. In his comments, the author reiterates that he has exhausted domestic remedies and encloses letters addressed to him by the Ombudsman, and the Registrars of the Supreme Court and the Constitutional Court. The Ombudsman, by letters of 11 December 1991 and 7 April 1992, informed the author of his right to legal representation and that he could not be of any assistance to him while the judicial proceedings were still pending in his case. By a letter of 5 February 1992, the Registrar of the Constitutional Court informed the author about the requirements for the recourse of amparo, among which were:

- enclosure of a copy of the decision from which leave to appeal is sought;

- exhaustion of all remedies available concerning the protection of the constitutional rights invoked;

- the request for amparo should be made within 20 days following the notification of the decision which allows no further appeal;

- representation by a solicitor and barrister; a request for legal aid should be accompanied by a detailed report of the facts on which the recourse of amparo is based.

The author was further informed that his letter would be sent to the Prosecutor General who would take action in his case, if deemed necessary.

The Committee's decision on admissibility

6.1 At its forty-ninth session, the Committee considered the admissibility of the communication. It noted the State party's contention that the communication was inadmissible because the author had failed to apply for amparo before the Constitutional Court, and had not fulfilled the procedural requirements that must be met if he wanted to avail himself of this remedy. It noted the author's allegation, which remained uncontested, that, after two years of imprisonment, he had not received any of the court documents in his case, which are a requisite for an appeal to the Constitutional Court. The Committee further observed that the Supreme Court had dismissed the author's appeal on 15 June 1992, that he was informally notified of that decision at the end of June 1992, and that the lawyer who had been appointed to him had not contacted him to date. In the circumstances of the case, the Committee did not consider that a petition for amparo before the Constitutional Court was a remedy available to the author. Furthermore, taking into account the fact that the statutory limits for filing a petition for amparo had expired, this remedy was no longer available. It was not apparent that the responsibility for this situation was attributable to the author. Therefore, the Committee did not find itself precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The Committee considered that the author had failed to substantiate, for purposes of admissibility, his claims under article 9, paragraph 1, and articles 17 and 26 of the Covenant. Accordingly, the Committee found this part of the communication inadmissible under article 2 of the Optional Protocol.

6.3 The Committee noted that the author had invoked article 7 in respect of his allegations concerning the events and conditions of the prison of Melilla. It found, however, that the facts as described by the author fell rather within the scope of article 10.

6.4 On 11 October 1993, the Committee declared the communication admissible in so far as it appeared to raise issues under article 9, paragraph 2, and articles 10 and 14 of the Covenant.

The State party's submission on the merits and comments of the author

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 31 May 1994, the State party indicates that, on 30 April 1993, the author was deported, under the 1983 Strasbourg Convention on the Deportation of Convicted Persons, to serve the rest of his sentence in Canada; he was released on parole on 8 August 1994. The State party refers to its earlier submissions and adds the following:

7.2 As to the claim under article 9, paragraph 2, the State party points out that the author and R. L. were arrested on 17 April 1991, at 11.30 p.m., after the police had searched their camper and discovered the drugs. The police reports (which were also signed by the lawyer who was assigned to the author and R. L. for purposes of an interrogation) reveal that the police refrained from taking statements from both men, because there was no interpreter present at the police station. The State party further points out that, the following morning, both the accused were brought before an examining magistrate; while represented by a lawyer and assisted by an interpreter, and having been informed of the charges against him and of his rights, the author made the deposition referred to in paragraph 4.4. above. On the same day (18 April 1991), the examining magistrate ordered the author's provisional detention. The State party concludes that the author was arrested in accordance with the law and benefited from all procedural guarantees, and that the depositions show the thoroughness with which the arrest was carried out, as well as the promptness with which the author was brought before a judge.

7.3 The State party submits that the author's claims under article 10 are unsubstantiated. In respect of the author's allegation that there is no distinction between convicted and unconvicted prisoners in Spain, the State party refers to articles 15 and 16 of the General Penitentiary Act, and submits that a distinction is made between accused and convicted persons and, within the category of convicted persons, between first offenders and recidivists. In particular, article 16 of the Act provides that, upon entering a penitentiary, prisoners will be immediately separated, taking into account sex, age, antecedents, physical and mental state and, when it concerns a convicted person, the requirements of the treatment.

7.4 The State party refers to the reports of two doctors who examined the author in the prison of Malaga, and who observed that the author did not begin a genuine hunger strike but limited himself to selective nutrition, as a result of which he lost 7 kg, and that no serious complications arose. It further refers to article 134 of the General Penitentiary Act in which the right of prisoners to complain about the treatment or about the prison regime in general is laid down, as well as the procedure and the persons to whom the complaint should be directed. The State party points out that there is no record of any complaint submitted by the author about his treatment in prison or the prison regime; on the contrary, it is submitted, the author has benefited from a reduction of his sentence by doing cleaning work, and he has received all necessary attention. The State party concludes that there is no evidence in support of the author's claims, and that he has failed to exhaust domestic remedies in respect of his claims under article 10 of the Covenant. It appears from the enclosures that, on 3 July 1993, a new penitentiary was opened at Melilla, and that the old prison, dating from 1885, was closed.

7.5 As to the author's claims under article 14, the State party reiterates that the Audiencia Provincial in Melilla has never received a complaint about the competence of Mr. Hassan Mohatar, the court interpreter. Furthermore, the State party points to the deposition which the author made on 18 April 1991 before the examining magistrate, and submits that he did not mention anything about the fact that he was left behind by R. L. and the other Canadian, or that they once returned with a different camper. It further reiterates that, during the trial, the author was not asked anything, and if there was any question from the judge, it was directed to R. L., who replied "that Gerald accompanied him all the time during the trip". [a]

7.6 The State party submits that the decision of the Audiencia Provincial is based on applicable law, and that it is for the courts to evaluate the facts and evidence. It points out that the Supreme Court reviewed the author's case and came to the following conclusion: "... the facts are fully established during the trial hearing, which is accepted by the appellant himself, who admits that he was arrested by the Guardia Civil in the port of Melilla, when he was going, in the company of the other accused, in a vehicle which had 68 kg of hashish ... hidden in its roof, ... coming from Morocco. From this, and from the accused's statements and the examination of their passports, it can be deduced that they undertook the trip together and that they obtained [the drugs] in Morocco for the subsequent traffic .... Thus, evidence for the charge exists ..., which detracts from the presumption of innocence (invoked by the author). The appellant seeks to give his own evaluation of the evidence, which comes exclusively within the competence of the tribunal ...".

7.7 Furthermore, the Supreme Court rejected the author's complaint that the court of first instance had committed an error in the evaluation of the evidence on the basis of documents that were submitted in the proceedings; in this context, the author referred to his and his co-accused's depositions, to the letters they had addressed to the examining magistrate, and to the record of the trial hearing. In declaring the claim inadmissible, the Supreme Court reiterated its jurisprudence that: "depositions of witnesses or accused are nothing else but personal documentary evidence, and therefore cannot serve to challenge in cassation an error of fact flowing from documents that answer for the trial judge's mistake; and the letters referred to, ..., are rather a statement ..., which lacks the guarantees of the presence of a judge, registrar and defence attorney;

especially when a statement is given during the preliminary inquiry and subsequently during the [trial] hearing". The State party concludes that the author, advised by counsel, did not apply for amparo against the Supreme Court's decision.

8.1 The author affirms that, on 8 August 1994, he was released on parole in Canada. He states that he is still willing to stand a re-trial in Spain to prove his innocence, provided that a competent lawyer, interpreter and impartial observers are present. For his comments on the State party's submissions, he refers to his previous letters in which he pointed out, inter alia, that pursuant to article 4, paragraph 2, of the Optional Protocol, the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities.

8.2 In this context, he submitted that the State party did not address his specific complaints, but was refuting his allegations in a general manner, and that he could not be expected "as a prisoner illegally tried, imprisoned and convicted in the face of overwhelming evidence to my innocence, with no resources, to provide proof, most of which is in the hands of the very people and organisations I am denouncing". He challenged the State party to invite the Committee to visit the prison of Melilla, to provide the Committee with the interpreter's titulo de interprete, and the date of qualification. In this context, he reiterated that the interpreter himself had indicated that he had not been appointed to interpret in English, but in Arabic and French. The author further requested the State party to make available to him all court documents relating to his case.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's claim that, as there was no interpreter present at the time of his arrest, he was not informed of the reasons for his arrest and of the charges against him, the Committee notes from the information before it that the author was arrested and taken into custody at 11:30 p.m. on 17 April 1991, after the police, in the presence of the author, had searched the camper and discovered the drugs. The police reports further reveal that the police refrained from taking his statement in the absence of an interpreter, and that the following morning the drugs were weighed in the presence of the author. He was then brought before the examining magistrate and, with the use of an interpreter, he was informed of the charges against him. The Committee observes that, although no interpreter was present during the arrest, it is wholly unreasonable to argue that the author was unaware of the reasons for his arrest. In any event, he was promptly informed, in his own language, of the charges held against him. The Committee therefore finds no violation of article 9, paragraph 2, of the Covenant.

9.3 As to the author's claim of a violation of article 10, on account of his conditions of detention, the Committee notes that they relate primarily to his incarceration at the prison of Melilla, where he was held from 18 April to 28 November 1991. Mr. Griffin has provided a detailed account about those conditions (see para. 3.1 above). The State party has not addressed this part of the author's complaint, confining itself to his treatment in the prison of Malaga, where he was transferred after his detention at Melilla, and to setting out relevant legislation. This apart, it has merely indicated that the old prison of Melilla was replaced by a modern penitentiary in the summer of 1993. In the absence of State party information on the conditions of detention at the prison of Melilla in 1991, and in the light of the author's detailed account of those conditions and their effect on him, the Committee concludes that Mr. Griffin's rights under article 10, paragraph 1, have been violated during his detention from 18 April to 28 November 1991.

9.4 The Committee has also noted the author's claim that, while awaiting trial at Melilla prison, he was detained together with convicted persons. The State party has merely explained that relevant Spanish legislation (arts. 15 and 16 of the General Penitentiary Act) provides for the separation of accused and convicted persons (see para. 7.3 above), without making clear whether the author was in fact separated from convicted prisoners while awaiting trial. The Committee notes that the author has sufficiently substantiated this allegation and concludes that there has been a violation of article 10, paragraph 2, in his case.

9.5 The Committee notes that the author claims that he did not receive a fair trial because of the incompetence of the court interpreter and the judge's failure to intervene in this respect, and that he was convicted because of poor translation of a question, as a result of which his statement during the trial differed from his original statement to the examining magistrate. The Committee notes, however, that the author did not complain about the competence of the court interpreter to the judge, although he could have done so. In the circumstances, the Committee finds no violation of article 14, paragraph 3 (f), of the Covenant.

9.6 The author further claims that there was no evidence against him. The Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case. It is not, in principle, for the Committee to review the facts and evidence presented to, and evaluated by, the domestic courts, unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge manifestly violated his obligation of impartiality.

9.7 The Committee notes that the author was assisted by a lawyer and interpreter when he made the statement to the examining magistrate set out in paragraph 4.4 above. It further notes that the author has signed the statement, which makes no reference to the fact that he was often left behind by R. L. and the other Canadian and that they once returned with a different camper. Furthermore, it transpires from the Acta del Juicio that the author merely stated during the trial hearing that he had no knowledge of the drugs concealed in the camper, and that, as submitted by the State party, R. L. testified that the author accompanied him during the whole trip. In the Committee's opinion, the author's claim that he was not allowed to give evidence or that he had inadequate interpretation during the hearing is not sufficiently substantiated. He was given the opportunity to make a statement, and it was R. L. and not the author himself who made the disputed affirmation.

9.8 As to the author's complaint about inadequate preparation and conduct of his defence at trial, the Committee notes that the barrister was privately retained by R. L. and the author, who granted power of attorney to her on 26 April 1991. It further notes from the information submitted by the author, that he was in constant contact with his lawyer in Canada and with the Canadian Embassy in Madrid, and that he had been assigned an attorney for the purpose of the preliminary hearing. If the author was dissatisfied with the performance of the barrister, he could have requested the judicial authorities to assign a lawyer to him, or he could have requested his Canadian lawyer to assist him in obtaining the services of another lawyer. Instead, the author continued to retain the services of the said barrister after his trial and conviction, until 8 November 1991. The Committee considers that, in the circumstances, any complaints, whether verified or not, about the author's barrister's conduct prior to or during the trial cannot be attributed to the State party. Accordingly, the Committee finds no violation of article 14 of the Covenant in this respect.

9.9 The Committee has taken note of the information submitted by the State party about the efforts made by the author's barrister, solicitor and the Colegio de Abogados of Melilla in respect of the author's appeal to the Supreme Court, and of the author's ambivalent attitude in spite of having been informed about the requirement of legal representation and the statute of limitations. It notes that the author had a legal representative, and this legal representative had access to the relevant court documents. This raises doubts about the veracity of his claim that he has never received a single document in his case. The Committee observes that the author was assigned legal representation for the purpose of his appeal, that grounds of appeal were argued on his behalf, and that his appeal was heard by the Supreme Court on the basis of a written procedure (sin celebración de vista), in conformity with article 893 bis (a) of the Code of Criminal Procedure. In the circumstances, and taking into account the fact that the case has been reviewed by the Supreme Court, the Committee finds no violation of article 14 in respect of the author's appeal.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 10, paragraphs 1 and 2, of the Covenant.

11. The Committee is of the view that Mr. Griffin is entitled, under article 2, paragraph 3 (a), of the Covenant, to a remedy, including appropriate compensation, for the period of his detention in the prison of Melilla.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, and while welcoming the State party's information that the old prison of Melilla was closed and replaced by a new penitentiary in 1993, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

a/ In this context, the State party refers to the handwritten annotations on the Acta del Juicio (Oral).

H. Communication No. 500/1992; Joszef Debreczeny v. Netherlands (Views adopted on 3 April 1995, fifty-third session)

Submitted by:	Joszef Debreczeny [represented by counsel]
Victim:	The author
State party:	The Netherlands
Date of decision on admissibility:	14 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1995,

Having concluded its consideration of communication No. 500/1992 submitted to the Human Rights Committee by Joszef Debreczeny under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Joszef Debreczeny, a citizen of the Netherlands, residing at Damwoude (municipality of Dantumadeel), the Netherlands. He claims to be the victim of a violation by the Netherlands of articles 25 and 26, *juncto* article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author states that, in general municipal elections, he was elected to the local council of Dantumadeel on 23 March 1990. The council, however, by decision of 10 April 1990, refused to accept his credentials; it considered that the author's employment as a national police sergeant, stationed at Dantumadeel, was incompatible with membership in the municipal council; in this connection, reference was made to article 25, paragraph f, of the *Gemeentewet* (Municipalities Act), which provides that membership in the municipal council is incompatible with, *inter alia*, employment as a civil servant in subordination to local authorities.

2.2 The author appealed the decision to the Raad van State (Council of State), which, on 26 April 1990, rejected his appeal. It considered that the author, as a national police officer, stationed at Dantumadeel, worked under the direct authority of the mayor of the municipality, for purposes of maintenance of public order and performance of auxiliary tasks; according to the Raad, this subordinate position was incompatible with membership in the local council, which is chaired by the mayor.

2.3 As the Raad van State is the highest administrative court in the Netherlands, the author submits that he has exhausted domestic remedies. He further states that the matter has not been submitted to any other procedure of international investigation or settlement.

Complaint

3.1 The author submits that the refusal to accept his membership in the local council of Dantumadeel violates his rights under article 25 (a) and (b) of the Covenant. He contends that every citizen, when duly elected, should have the right to be a member of the local council of the municipality where he resides, and that the relevant regulations, as applied to him, constitute an unreasonable restriction on this right within the meaning of article 25 of the Covenant.

3.2 According to the author, his subordination to the mayor of Dantumadeel is merely of a formal character; the mayor seldom gives direct orders to police sergeants. In support of his argument he submits that appointments of national policemen are made by the Minister of Justice, and that the mayor has authority over national police officers only with respect to the maintenance of public order; for the exercise of this authority the mayor is not accountable to the municipal council, but to the Minister of Internal Affairs.

3.3 The author further alleges that article 26 of the Covenant has been violated in his case. He contends that membership in the local council is not denied to local firemen and teaching staff, although they also work in a subordinate position to the mayor of the municipality. He also submits that other municipal councils have not challenged the credentials of local police officers, who are duly elected to the council. In this connection, he mentions examples of the municipalities of Sneek and Wapenveld.

State party's observations on admissibility and the author's comments thereon

4.1 By submission of 27 October 1992, the State party provides information about the factual and legal background of the case. It submits that the right to vote and to stand in elections is enshrined in article 4 of the Constitution of the Netherlands, according to which every national of the Netherlands "shall have an equal right to elect the members of the general representative bodies and to stand for election as a member of those bodies, subject to the limitations and exceptions prescribed by Act of Parliament".

4.2 In agreement with the Constitution, section 25 of the Municipalities Act sets forth the positions which may not be held simultaneously with membership in a municipal council. Three groups of positions are held to be incompatible with membership: (a) positions of authority over or supervision of the municipal council; (b) positions which are subject to the supervision of a municipal administrative authority; (c) positions which by their nature cannot be combined with membership in the council. The State party explains that the rationale for these exclusions is to guarantee the integrity of municipal institutions and hence to safeguard the democratic decision-making process, by preventing a conflict of interests.

4.3 Pursuant to section 25, paragraph 1 (f), of the Act, membership in the municipal council is incompatible with a position as a public servant appointed by or on behalf of the municipal authority or subordinate to it. Exceptions to incompatibility are made for those civil servants working for the public registrar's office, those working as teaching staff at public schools and those who give their services as volunteers.

4.4 Officers in the national police force are appointed by the Minister of Justice, but are, pursuant to section 35 of the Police Act, subject to the authority of the mayor when engaged in maintaining public order. The State party argues that, since a subordinate relationship exists and consequently a conflict of interests may arise, it is reasonable not to permit police officers to become members of the municipal council in the municipality in which they serve.

4.5 As regards the admissibility of the communication, the State party concedes that domestic remedies have been exhausted. However, it contends that the incompatibility of membership in the municipal council with the author's position in the national police force, as regulated in the Municipalities Act, is a reasonable restriction to the author's right to be elected and based on objective grounds. The State party submits that the author has no claim under article 2 of the Optional Protocol and that his communication should therefore be declared inadmissible.

5.1 In his comments on the State party's submission, the author argues that no conflict of interests exists between his position as a national police officer and membership in the municipal council. He submits that the council, not the mayor, is the highest authority of the municipality and that, with regard to the maintenance of public order, the mayor is accountable to the Minister of Justice, not to the council.

5.2 The author refers to his original communication and claims that inequality of treatment exists between officers in the national police force and other public officers who are subordinate to municipal authorities. In this context, he mentions that teachers in public schools were, until 1982, also barred from membership in municipal councils but are now eligible for membership, following an amendment to the law. The author therefore argues that no reasonable ground exists to hold his position as a national police officer incompatible with membership in the municipal council.

Committee's decision on admissibility

6. At its forty-ninth session, the Committee considered the admissibility of the communication. It noted the State party's argument that the restrictions placed upon the author's eligibility for membership in the municipal council of Dantumadeel were reasonable within the meaning of article 25. The Committee considered that the question whether the restrictions were reasonable should be considered on the merits in the light of articles 25 and 26 of the Covenant. Consequently, on 14 October 1993,

the Committee declared the communication admissible.

State party's observations on the merits and the author's comments thereon

7.1 By submission of 17 August 1994, the State party reiterates that the Constitution of the Netherlands guarantees the right to vote and to stand in elections, and that section 25 of the Municipalities Act, which was in force at the time of Mr. Debreczeny's election, lays down the positions deemed incompatible with membership in a municipal council. Pursuant to this section, officials subordinate to the municipal authority are precluded from membership in the municipal council. The State party recalls that the rationale for the exclusion of certain categories of persons from membership in the municipal council is to guarantee the integrity of municipal institutions and hence to safeguard the democratic decision-making process, by preventing a conflict of interests.

7.2 The State party explains that the term "municipal authority" used in section 25 of the Act encompasses the municipal council, the municipal executive and the mayor. It points out that if holders of positions subordinate to municipal administrative bodies other than the council were to become members of the council, this would also undermine the integrity of municipal administration, since the council, as the highest administrative authority, can call such bodies to account.

7.3 The State party explains that officers of the national police force, like Mr. Debreczeny, are appointed by the Minister of Justice, but that they were, according to section 35 of the Police Act in force at the time of Mr. Debreczeny's election, subordinate to part of the municipal authority, namely the mayor, with respect to the maintenance of public order and emergency duties. The mayor has the power to issue instructions to police officers for these purposes and to issue all the necessary orders and regulations; he is accountable to the council for all measures taken. Consequently, police officers as members of the municipal council would on the one hand have to obey the mayor and on the other call him to account. According to the State party, this situation would give rise to an unacceptable conflict of interests, and the democratic decision-making process would lose its integrity. The State party maintains, therefore, that the restrictions excluding police officers from membership in the council of the municipality where the officers are posted are reasonable and do not constitute a violation of article 25 of the Covenant.

7.4 With regard to the author's statements that these restrictions do not apply to members of the fire brigade and to teachers, the State party points out that section 25 of the Municipalities Act makes two exceptions to the general rule that public servants appointed by or subordinate to the municipal institutions may not be council members. These exceptions apply to those who work for the emergency services on a voluntary basis or by virtue of a statutory obligation, and to teaching staff. The State party explains that the fire brigade in the Netherlands is manned by both professionals and volunteers. Under the law, only volunteer members of the fire brigade may serve on the municipal council; professional firemen are similarly excluded from taking seats in the council of the municipality in which they serve. The State party admits that formally volunteer firemen are appointed by and subordinate to the municipal authority. In the opinion of the State party, however, the mere fact of formal subordination to the municipal council does not in itself provide sufficient reason for denying a citizen the right to be elected to the council; in addition, there must exist a real risk of a conflict arising between individuals' interests as civil servants and their interests as council members, threatening to undermine the integrity of the relationship between municipal institutions. In the light of the fact that volunteers are more independent than professionals (who depend on the post for their livelihood) vis-à-vis the services they work for, the State party argues that the risk of a conflict of interests for volunteers is negligible and that it would therefore not be reasonable to restrict their constitutional right to be elected in a general representative body.

7.5 The State party further explains that private schools and public schools coexist on the basis of equality in the Netherlands, and that teachers in a public school are appointed by the municipal authority. Formally, a hierarchical relationship can therefore be said to exist. The State party points out, however, that education policy in the Netherlands is pre-eminently the concern of the State and that quality requirements and funding criteria are laid down by law. Supervision of public schools is carried out at the national level by the central education inspectorate, and not by the municipal authority. A conflict of interest between obeying the municipal authority and calling it to account, as exists for police officers, is therefore not likely to arise. The State party considers therefore that a restriction on the eligibility of teachers to a municipal council would be unreasonable.

7.6 The State party further addresses the cases in which, according to the author, local policemen were not prevented from becoming members in their respective municipal councils. The State party begins by emphasizing that the Netherlands is a decentralized unitary State, and that municipal authorities have the power to regulate and administer their own affairs. In the context of elections, municipalities themselves are responsible in the first instance to ensure that councils are lawfully and properly composed. This means that, if a candidate has been elected, the council itself decides whether he may be admitted as a member or whether there are legal obstacles that prevent him from taking his seat. Appeal against the council's decision can be lodged with an administrative court; interested parties may moreover apply to an administrative court if they are of the opinion that a certain council member was wrongfully admitted.

7.7 In the case of Sneek, mentioned by the author, the State party indicates that the police officer who was appointed to the municipal council was employed by the National Police Waterways Branch and based at Leeuwarden. The State party states that as such he was neither subordinate to nor appointed by the municipality of Sneek and that his position is therefore not incompatible with membership in the council.

7.8 In the case of Heerde, mentioned by the author, the State party admits that, between 1982 and 1990, an officer of the National Police Force, employed in the Heerde unit of the force, served as a member of the municipal council. The State party submits that this membership was unlawful; however, since no interested party contested the policeman's election to the municipal council before a court, he was able to maintain his position. The State party argues that "the mere fact that a police officer in Heerde sat unlawfully on the council of the municipality in which he was employed does not mean that Mr. Debreczeny may also sit unlawfully on the council of the municipality in which he is employed". It adds that the principle of equality cannot be invoked to reproduce a mistake made in the application of the law.

7.9 In conclusion, the State party submits that there are no reasons to find that articles 25 or 26 of the Covenant were violated in the author's case. It argues that the provisions, laid down in section 25 of the Municipalities Act, governing the compatibility of positions with membership in a municipal council are completely reasonable, and that the protection of democratic decision-making procedures requires that individuals holding certain positions be barred from membership in municipal councils if such membership would entail an unacceptable risk of a conflict of interests. To prevent this general rule from leading to an unreasonable curtailment of the right to stand for election exceptions have been created for volunteer firemen and teaching staff, and the incompatibility of council membership for police officers has been limited to the council of the municipality in which the person in question is employed.

8.1 In his comments on the State party's submission, counsel to the author submits that the State party's interpretation of section 25 of the Municipalities Act, that the incompatibility is limited to those police officers who are elected to the council of the municipality in which they are employed, is too narrow. He submits that the law applies to all municipalities in which the person concerned can be theoretically requested to serve. In this context, counsel points out that the membership of the police officer in the municipal council of Sneek is therefore also against the law, since, although he is posted at Leeuwarden, his working region includes Sneek.

8.2 As regards the exception made for volunteer firemen, counsel points out that volunteers do receive an emolument for services rendered and that they are appointed by the municipal authority, whereas national police officers are appointed by the Minister of Justice. As regards teaching personnel, which is appointed by the municipal authority, counsel argues that there exists a more than theoretic risk of a conflict of interests, especially in the case of a headmaster functioning as a council member. In reply to the State party's argument that the statute for teaching staff is determined on the national level, counsel points out that this is also the case for national police officers.

8.3 Counsel argues that it is not reasonable to allow teaching staff to become members of the municipal council while maintaining the incompatibility for police officers. In this context, it is argued that 99 per cent of the national police officers do not receive direct orders from the mayor, but from their immediate superior, with whom the mayor communicates.

8.4 Counsel further refers to the parliamentary debate in 1981 which led to the exception of teaching staff from the incompatibility rules, during which the general character of the remaining incompatibilities was deemed to be arbitrary or insufficiently motivated. In this context, counsel states that parliament defended the exception for teaching staff inter alia by referring to section 52 of the Municipalities Act, which states that a councillor should refrain from voting on matters in which he is personally involved. It was argued that this clause offered sufficient guarantees for proper decision-making in municipal councils. Moreover, it was argued that it is up to the electorate, the political parties and the persons concerned to ensure that the democratic rules are observed.

8.5 Counsel contends that the same arguments apply to the position of national police officers who wish to take up their seat in the municipal council. He submits that the probability that in a few cases complications may arise does not justify the categorical prohibition which was applied to Mr. Debreczeny. He concludes therefore that the limitation of Mr. Debreczeny's right to be elected was unreasonable. In this connection, he refers to a statement made by the Government during the parliamentary discussion on the restructuring of the police force, in which it was stated that members of a regional functional police unit shall be prohibited from becoming members of the municipal council only when it is plausible that the unit in a municipality can be deployed to a significant extent for public order purposes.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the application of the restrictions provided for in section 25 of the Municipalities Act, as a consequence of which the author was prevented from taking his seat in the municipal council of Dantumadeel to which he was elected, violated the author's right under article 25 (b) of the Covenant. The Committee notes that the right provided for by article 25 is not an absolute right and that restrictions of this right are allowed as long as they are not discriminatory or unreasonable.

9.3 The Committee notes that the restrictions on the right to be elected to a municipal council are regulated by law and that they are based on objective criteria, namely the electee's professional appointment by or subordination to the municipal authority. Noting the reasons invoked by the State party for these restrictions, in particular, to guarantee the democratic decision-making process by avoiding conflicts of interest, the Committee considers that the said restrictions are reasonable and compatible with the purpose of the law. In this context, the Committee observes that legal norms dealing with bias, for example section 52 of the Municipalities Act to which the author refers, are not apt to cover the problem of balancing interests on a general basis. The Committee observes that the author was at the time of his election to the council of Dantumadeel serving as a police officer in the national police force, based at Dantumadeel and as such for matters of public order subordinated to the mayor of Dantumadeel, who was himself accountable to the council for measures taken in that regard. In these circumstances, the Committee considers that a conflict of interests could indeed arise and that the application of the restrictions to the author does not constitute a violation of article 25 of the Covenant.

9.4 The author has also claimed that the application of the restrictions to him is in violation of article 26 of the Covenant, because (a) the restrictions do not apply to volunteer firemen and to teaching staff and (b) in two cases, police officers were allowed to become members of the council of the municipality in which they served. The

Committee notes that the exception for volunteer firemen and teaching staff is provided for by law and based on objective criteria, namely, for volunteer firemen, the absence of income dependency, and, for teaching staff, the lack of direct supervision by the municipal authority. With regard to the two specific cases mentioned by the author, the Committee considers that, even if the police officers concerned were in the same position as the author and were unlawfully allowed to take up their seats in the council, the failure to enforce an applicable legal provision in isolated cases does not lead to the conclusion that its application in other cases is discriminatory. [a] In this connection, the Committee notes that the author has not claimed any specific ground for discrimination and that the State party has explained the reasons for the different treatment stating that, in one case, the facts were materially different and that, in the other, the membership was unlawful but the court never had an opportunity to review it because the case was not brought before it by any of the interested parties. The Committee concludes therefore that the facts of Mr. Debreczeny's case do not reveal a violation of article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[a] See also the Committee's decision declaring inadmissible communication No. 273/1988 (B.d.B. v. the Netherlands), adopted on 30 March 1989, in which the Committee stated that it is "not competent to examine errors allegedly committed in the application of laws concerning persons other than the authors of a communication" (para. 6.6).

I. Communication No. 511/1992; Ilmari Länsman et al. v. Finland
(Views adopted on 26 October 1994, fifty-second session)

Submitted by:	Ilmari Länsman et al. [represented by counsel]
Victims:	The authors
State party:	Finland
Date of communication:	11 June 1992 (initial submission)
Date of decision on admissibility:	14 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 1994,

Having concluded its consideration of communication No. 511/1992 submitted to the Human Rights Committee by Ilmari Länsman et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are Ilmari Länsman and forty-seven other members of the Muotkatunturi Herdsmen's Committee and members of the Angeli local community. They claim to be the victims of a violation by Finland of article 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as presented by the authors:

2.1 The authors are all reindeer breeders of Sami ethnic origin from the area of Angeli and Inari; they challenge the decision of the Central Forestry Board to pass a contract with a private company, Arktinen Kivi Oy (Arctic Stone Company) in 1989, which would allow the quarrying of stone in an area covering ten hectares on the flank of the mountain Etela-Riutusvaara. Under the terms of the initial contract, this activity would be authorized until 1993.

2.2 The members of the Muotkatunturi Herdsmen's Committee occupy an area ranging from the Norwegian border in the West, to Kaamanen in the East, comprising both sides on the road between Inari and Angeli, a territory traditionally owned by them. The area is officially administered by the Central Forestry Board. For reindeer herding purposes, special pens and fences, designed for example to direct the reindeers to particular pastures or locations, have been built around the village of Angeli. The authors point out that the question of ownership of lands traditionally used by the Samis is disputed between the Government and the Sami community.

2.3 The authors contend that the contract signed between the Arctic Stone Company and the Central Forestry Board would not only allow the company to extract stone but also to transport it right through the complex system of reindeer fences to the Angeli-Inari road. They note that in January of 1990, the company was granted a permit by the Inari municipal authorities for the extraction of some 5,000 cubic metres of building stone, and that it obtained a grant from the Ministry of Trade and Industry for this very purpose.

2.4 The authors admit that until now, only some limited test-quarrying has been carried out; by September 1992, some 100,000 kilograms of stone (approximately 30 cubic metres) had been extracted. The authors concede that the economic value of the special type of stone concerned, anorthocite, is considerable, since it may replace marble in, above all, representative public buildings, given that it is more resistant to air-borne pollution.

2.5 The authors affirm that the village of Angeli is the only remaining area in Finland with a homogenous and solid Sami population. The quarrying and transport of anorthocite would disturb their reindeer herding activities and the complex system of reindeer fences determined by the natural environment. They add that the transport of the stone would run next to a modern slaughterhouse already under construction, where all reindeer slaughtering must be carried out as of 1994, so as to meet strict export standards.

2.6 Furthermore, the authors observe that the site of the quarry, mount Etelä-Riutusvaara, is a sacred place of the old Sami religion, where in old times reindeer were slaughtered, although the Samis now inhabiting the area are not known to have followed these traditional practices for several decades.

2.7 As to the requirement of exhaustion of domestic remedies, the authors point out that 67 members of the Angeli local community appealed, without success, against the quarrying permit to the Lapland Provincial Administrative Board as well as to the Supreme Administrative Court[15], where they specifically invoked article 27 of the Covenant. On 16 April 1992, the Supreme Administrative Court dismissed the appeal without addressing the alleged violations of the Covenant. According to the authors, no further domestic remedies are available.

2.8 Finally, at the time of submission of the communication in June 1992, the authors, fearing that further quarrying is imminent, requested the adoption of interim measures of protection, under rule 86 of the Committee's rules of procedure, so as to avoid irreparable damage.

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[15] It should be noted that not all of the authors of the communication before the Committee appealed to the Supreme Court.

The complaint:

3.1 The authors affirm that the quarrying of stone on the flank of the Etelä-Riutusvaara mountain and its transportation through their reindeer herding territory would violate their rights under article 27 of the Covenant, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry.

3.2 In support of their contention of a violation of article 27, the authors refer to the Views adopted by the Committee in the cases of Ivan Kitok (No. 197/1985) and B. Ominayak and members of the Lubicon Lake Band v. Canada (No. 167/1984), as well as to ILO Convention No.169 concerning the rights of indigenous and tribal people in independent countries.

The State party's information and observations and counsel's comments thereon:

4.1 The State party confirms that quarrying of stone in the area claimed by the authors was made possible by a permit granted by the Angeli Municipal Board on 8 January 1990. Pursuant to Act No. 555/1981 on extractable land resources, this permit was at the basis of a contract passed between the Central Forestry Board and a private company, which is valid until 31 December 1993.

4.2 The State party opines that those communicants to the Committee who, in the matter under consideration, have applied both to the Lapland Provincial Administrative Board and to the Supreme Administrative Court have exhausted all available domestic remedies. As the number of individuals who appealed to the Supreme Administrative Court is however lower than the number of those who filed a complaint with the Committee, the State party considers the communication inadmissible on the ground of non-exhaustion of domestic remedies in respect of those authors who were not a party to the case before the Supreme Administrative Court.

4.3 The State party concedes that "extraordinary appeals" against the decision of the Supreme Administrative Court would have no prospect of success, and that there are no other impediments, on procedural grounds, to the admissibility of the communication. On the other hand, it submits that the authors' request for the adoption of interim measures of protection was "clearly premature", as only test quarrying on the contested site has been carried out.

5.1 In his comments, counsel rejects the State party's argument that those authors who did not personally sign the appeal to the Supreme Administrative Court failed to exhaust available domestic remedies. He argues that "[a]ll the signatories of domestic appeals and the communication have invoked the same grounds, both on the domestic level and before the Human Rights Committee. The number and identity of signatories was of no relevance for the outcome of the Supreme Court judgment, since the legal matter was the same for all the signatories of the communication...".

5.2 Counsel contends that in the light of the Committee's jurisprudence in the case of Sandra Lovelace v. Canada, all the authors should be deemed to have complied with the requirements of article 5, paragraph 2(b), of the Optional Protocol. In this case, he recalls, the Committee decided that the Protocol does not impose on authors the obligation to seize the domestic courts if the highest domestic court has already substantially decided the question at issue. He affirms that in the case of Mr. Länsman and his co-authors, the Supreme Administrative Court has already decided the matter in respect of all the authors.

5.3 In further comments dated 16 August 1993, counsel notes that the lease contract for Arktinen Kivi Oy expires at the end of 1993, and that negotiations for a longer lease are underway. If agreement on a long-term lease is reached, Arktinen intends to undertake considerable investments, inter alia for road construction. Counsel further notes that even the limited test quarrying carried out so far has left considerable marks on Mount Etelä-Riutusvaara. Similarly, the marks and scars left by the provisional road allegedly will remain in the landscape for hundreds of years, because of extreme climatic conditions. Hence, the consequences for reindeer herding are greater and will last longer than the total amount of stone to be taken from the quarry (5,000 cubic metres) would suggest. Finally, counsel reiterates that the location of the quarry and the road leading to it are of crucial importance for the activities of the Muotkatunturi Herdsmen's Committee, because their new slaughterhouse and the area used for rounding up reindeers are situated in the immediate vicinity.

The Committee's admissibility decision:

6.1 During its 49th session, the Committee considered the admissibility of the communication. It noted that the State party did not object to the admissibility of the complaint in respect of all those authors which had appealed the quarrying permit both to the Lapland Provincial Administrative Board and to the Supreme Administrative Court of Finland, and that only in respect of those authors who had not personally appealed to the Supreme Administrative Court did it contend that domestic remedies had not been exhausted.

6.2 The Committee disagreed with the State party's reasoning and recalled that the facts at the basis of the decision of the Supreme Administrative Court of 16 April 1992 and of the case before the Committee were identical; had those who did not personally sign the appeal to the Supreme Administrative Court done so, their appeal would have been dismissed along with that of the other appellants. It was unreasonable to expect that if they applied to the Supreme Administrative Court now, on the same facts and with the same legal arguments, this court would hand down another decision. The Committee reiterated its earlier jurisprudence that wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies, for the purposes of the Optional Protocol. The Committee therefore concluded that the requirements of article 5, paragraph 2(b), of the Optional Protocol had been met.

6.3 The Committee considered that the authors' claims pertaining to article 27 had been substantiated, for purposes of admissibility, and that they should be considered on their merits. As to the authors' request for interim measures of protection, it noted that the application of rule 86 of the rules of procedure would be premature but that the authors retained the right to address another request under rule 86 to the Committee if there were reasonably justified concerns that quarrying might resume.

6.4 On 14 October 1993, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under article 27 of the Covenant.

State party's submission on the merits and counsel's comments thereon:

7.1 In its submission under article 4, paragraph 2, dated 26 July 1994, the State party supplements and corrects the facts of the case. Concerning the issue of ownership of the area in question, it notes that the area is state-owned, as it had been awarded to the State in a general reparceling. It was inscribed as state-owned in the land register and is regarded as such in the jurisprudence of the Supreme Court (judgment of 27 June 1984 dealing with the determination of water limits in the Inari municipality). Powers inherent in the ownership are used by the Finnish Forestry and Park Service (formerly the Central Forestry Board), which is entitled, inter alia, to construct roads.

7.2 The State party further provides information on another case involving planned logging and road construction activities in the Inari District, which had been decided by the Inari District Court and the Rovaniemi Court of Appeal. These courts assessed the matter at issue in the light of article 27 of the Covenant but concluded that the contested activities did not prevent the complainants from practising reindeer herding.

7.3 As to the merits of the authors' claim under article 27, the State party concedes that the concept "culture" in article 27 also covers reindeer herding as an "essential component of the Sami culture". It examines whether the quarrying permit, its exploitation, and the contract between the Central Forestry Board and Arktinen Kivi Oy violates the authors' rights under article 27. In this connection, several provisions of Act No. 555/1981 on Extractable Land resources are relevant. Thus, Section 6 stipulates that an extraction (quarrying) permit may be delivered if certain conditions laid down in the Act have been met. Section 11 defines these conditions as "orders which the applicant must follow in order to avoid or restrict damages caused by the project in question". Under Section 9, subsection 1, the contractor is liable to compensate the owner of real estate for any extraction of land resources which causes (environmental or other) damage which cannot be qualified as minor. Section 16, litera 3, allows the State authority to amend the conditions of the initial permit or to withdraw it, especially when extraction of land resources has had unpredictable harmful environmental effects.

7.4 As to the permit issued to Arktinen Kivi Oy, the State party notes that it is valid until 31 December 1999, but only if the Finnish Forestry and Park Service upholds the contract until that date. Another condition requires that during and after the quarrying, the area in question must be kept "clear and safe". Condition No. 3 lays down that every year, quarrying should be carried out within the period 1 April to 30 September, as requested by the Muotkatunturi Herdsmens' Committee in its letter of 5 November 1989 to the Inari municipality. This is because reindeers do not pasture in the area during this period. The same condition also stipulates that means of communication (transport) to and within the area must be arranged in coordination with the Herdsmens' Committee, and that any demands of the Angeli Community Committee should be given due consideration.

7.5 In October 1989, a contract between the Central Forestry Board and the company was concluded, which gave the company the right to use and extract stone in an area covering 10 hectares, to a maximum of 200 cubic metres. This contract was valid until the end of 1993. Under the terms of the contract, means of transportation/communication had to be agreed upon with the district forester. Edges of holes had to be smoothed during quarrying; after quarrying, the slopes had to be remodelled in such a way as not to constitute a danger for animals and men and not to disfigure the landscape. In March 1993, the company requested a new land lease contract; an inspection of the site on 30 July 1993 was attended by a representative of the Forest District, the company, the Angeli Community Committee, the Herdsmens' Committee, and the building inspector of Inari community. The company representatives noted that the construction of a proper road was necessary for the project's profitability; the representative of the Forest District replied that the Herdsmens' Committee and the company had to find a negotiated solution. The State party adds that the Forestry and Park Service has informed the Government that a decision on a possible new contract with the company will be taken only after the adoption of Views by the Committee in the present case.

7.6 As to actual quarrying, the State party notes that the company's activity in the area has been insignificant, both in terms of amount of extracted stone (30 cubic metres) and the extent (10 hectares) of the quarrying area on Mt. Riutusvaara. By comparison, the total area used by the Muotkatunturi Herdsmens' Committee covers 2,586 square kilometres, whereas the area fenced in for quarrying covered only approximately one hectare and is only four kilometres away from the main road. In two expert statements dated 25 October 1991 submitted to the Supreme Administrative Court, it is noted that "extraction of land resources from Etelä-Riutusvaara has, as regards its size, no significance on the bearing capacity of the pastures of the Muotkatunturi Herdsmens' Committee". Neither can, in the State party's opinion, the extraction have any other negative effects on reindeer husbandry. The Government disagrees with the authors' assertion that already limited test quarrying has caused considerable damage to Etelä-Riutusvaara.

7.7 In the above context, the State party notes that it appears from an opinion of the Environmental Office of the Lapland County Administrative Board (dated 8 May 1991) that only low pressure explosives are used to extract stone from the rock: "Extraction is carried out my means of sawing and wedging techniques ... to keep the rock as whole as possible". As a result, possible harm to the environment remains minor. Furthermore, it transpires from a statement dated 19 August 1990 from the Inari Municipal Executive

Board to the County Administrative Board that special attention was paid by the Board and the company to avoid disturbing reindeer husbandry in the area. The State party refers to Section 2, subsection 2, of the Reindeer Husbandry Act, which requires that the northernmost State-owned areas shall not be used in ways which can seriously impair reindeer husbandry; it adds that the obligations imposed by article 27 were observed in the permit proceedings.

7.8 With regard to the question of road construction in the quarrying area, the State party notes that transport of the test blocks of stone initially took place on an existing road line, with the help of one of the authors. The company only extended the road line for approximately one kilometre into another direction (not through the authors' reindeer fences), while using the existing road for transport of stone to the main road. The State party observes that the road line has thus been decided upon by the authors themselves. At a meeting on 15 October 1993 of the Inari Advisory Board, the company advised that the construction of a proper road would improve the profitability of the project; and as conceded by the Inari Municipal Board in a written submission to the Supreme Administrative Court in August 1991, the construction of such a road is technically possible without causing disturbances for reindeer husbandry.

7.9 The State party submits that in the light of the above and given that only 30 cubic metres of rock have actually been extracted, the company's activity has been insignificant in relation to the authors' rights under article 27, especially reindeer herding. Similar conclusions would apply to the possible quarrying of the total allowable extractable amount of stone and its transport over a proper road to the main road. In this context, the State party recalls the Committee's Views in Lovelace v. Canada, which state that "not every interference can be regarded as a denial of rights within the meaning of article 27 ... (but) restrictions must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant...". This principle, according to the State party, applies to the present case.

7.10 The State party concedes "that the concept of culture in the sense of article 27 provides for a certain protection of the traditional means of livelihood for national minorities and can be deemed to cover livelihood and related conditions insofar as they are essential for the culture and necessary for its survival. This means that not every measure and every effect of it, which in some way alters the previous conditions, can be construed as adverse interference in the rights of minorities to enjoy their own culture under article 27". Relevant references to the issue have been made by the Parliamentary Committee for Constitutional Law, in relation with Government Bill 244/1989, to the effect that reindeer husbandry exercised by Samis shall not be subject to unnecessary restrictions.

7.11 This principle, the State party notes, was underlined by the authors themselves in their appeal to the Lapland County Administrative Board: thus, before the domestic authorities, the authors themselves took the stand that only unnecessary and essential interferences with their means of livelihood, in particular reindeer husbandry, would raise the spectre of a possible violation of the Covenant.

7.12 The State disagrees with the statement of the authors' counsel before the Supreme

Administrative Court (10 June 1991) according to which, by reference to the Committee's Views in the case of B. Ominayak and members of the Lubicon Lake Band v. Canada[16], every measure, even a minor one, which obstructs or impairs reindeer husbandry must be interpreted as prohibited by the Covenant. In this context, the State party quotes from paragraph 9 of the Committee's General Comment on article 27, which lays down that the rights under article 27 are "directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned...". Furthermore, the question of "historical inequities", which arose in the Lubicon Lake Band case, does not arise in the present case. The State party rejects as irrelevant the authors' reliance on certain academic interpretations of article 27 and on certain national court decisions. It claims that the Human Rights Committee's Views in the case of Kitok[17] imply that the Committee endorses the principle that States enjoy a certain degree of discretion in the application of article 27 - which is normal in all regulation of economic activities. According to the State party, this view is supported by the decisions of the highest tribunals of States parties to the Covenant and the European Commission on Human Rights.

7.13 The State party concludes that the requirements of article 27 have "continuously been taken into consideration by the national authorities in their application and implementation of the national legislation and the measures in question". It reiterates that a margin of discretion must be left to national authorities even in the application of article 27: "As confirmed by the European Court of Human Rights in many cases ..., the national judge is in a better position than the international judge to make a decision. In the present case, two administrative authorities and ... the Supreme Administrative Court, have examined the granting of the permit and related measures and considered them as lawful and appropriate". It is submitted that the authors can continue to practise reindeer husbandry and are not forced to abandon their lifestyle. The quarrying and the use of the old forest road line, or the possible construction of a proper road, are insignificant or at most have a very limited impact on this means of livelihood.

8.1 In his comments, dated 31 August 1994, counsel informs the Committee that since the initial submission of the complaint, the Muotkatunturi Herdsmens' Committee has somewhat changed its reindeer herding methods. As of spring 1994, young fawns are not kept fenced in with their mothers, so that the reindeer pasture more freely and for a larger part of the year than previously in areas north of the road between Angeli and Inari, including Southern Riutusvaara. Reindeer now also pasture in the area in April and September. Counsel adds that Southern Riutusvaara is definitely not unsuitable for reindeer pasture, as contended by the State party, as the reindeer find edible lichen there.

8.2 As to the supplementary information provided by the State party, the authors note that thus far, the companies quarrying on Mount Etelä-Riutusvaara have not covered any holes or smoothed edges and slopes after the expiry of their contracts. The authors attach particular importance to the State party's observation that the lease contract between the Central Forestry Board and Arktinen Kivi Oy was valid until the end of 1993. This implies that no contractual obligations would be breached if the Human Rights Committee were to find that any further quarrying would be unacceptable in the light of article 27.

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[16] Views adopted by the Committee at its 38th session, 26 March 1990.

[17] Case No. 197/1985, Views adopted during the Committee's 33rd session on 27 July 1988, paragraph 9.3.

8.3 As to the road leading to the quarry, the authors dismiss as misleading the State party's argument that the disputed road has been or would have been constructed in part "by one of the authors". They explain that the road line has been drawn by the two companies wishing to extract stone from the area. Counsel concedes however that the first company used a Sami as "employee or subcontractor in opening the road line. This is probably the reason why the person in question ... did not want to sign the communication to the Human Rights Committee".

8.4 The authors criticize that the State party has set an unacceptably high threshold for the application of article 27 of the Covenant and note that what the Finnish authorities appear to suggest is that only once a State party has explicitly conceded that a certain minority has suffered historical inequities, it might be possible to conclude that new developments which obstruct the cultural life of a minority constitute a violation of article 27. To the authors, this interpretation of the Committee's Views in the Lubicon Lake Band case is erroneous. They contend that what was decisive in Ominayak was that a series of incremental adverse events could together constitute a 'historical inequity' which amounted to a violation of article 27.[18]

8.5 According to counsel, the situation of the Samis in the Angeli area may be compared with "assimilation practices", or at least as a threat to the cohesiveness of their group through quarrying, logging and other forms of exploitation of traditional Sami land for purposes other than reindeer herding.

8.6 While the authors agree that the question of ownership of the land tracts at issue is not per se the subject matter of the case, they observe that (a) ILO Convention No. 169, although not yet ratified by Finland, has a relevance for domestic authorities which is comparable to the effect of concluded treaties (opinion No. 30 of 1993 by the Parliamentary Constitutional Law Committee) and (b) neither the general reparceling nor the entries into the land register can have constitutive effect for the ownership of traditional Sami territory. In this context, the authors note that the legislator is considering a proposal to create a system of collective land ownership by the Sami villages:

> "As long as the land title controversy remains unsettled..., Finnish Samis live in a situation that is very sensitive and vulnerable in relation to any measures threatening their traditional economic activities. Therefore, the existing Riutusvaara

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[18] In this context, the authors refer to the analysis of the Views in the Lubicon Lake Band case by Professor Benedict Kingsbury (25 Cornell International Law Journal (1992)), and by Professor Manfred Nowak (CCPR Commentary, 1993).

quarry and the road to it, created with the involvement of public authorities, are to be considered a violation of article 27... The renewal of a land lease contract between the Central Forestry Board [sc.: its legal successor] and the ... company would also violate article 27".

8.7 Finally, the authors point to new developments in Finland which are said to highlight the vulnerability of their own situation. As a consequence of the Agreement on the European Economic Area (EEA), which entered into force on 1 January 1994, foreign and transnational companies registered within the EEA obtain a broader access to the Finnish market than before. The most visible consequence has been the activity of multinational mining companies in Finnish Lapland, including the northernmost parts inhabited by Samis. Two large foreign mining companies have registered large land tracts for research into the possibility of mining operations. These areas are located in the herding areas of some Reindeer Herding Committees. On 11 June 1994, the Sami Parliament expressed concern over this development. The authors consider that the outcome of the present case will have a bearing on the operation of the foreign mining companies in question.

8.8 The information detailed in 8.7 above is supplemented by a further submission from counsel dated 9 September 1994. He notes that the activity of multinational mining companies in Northern Lapland has led to a resurgence of interest among Finnish companies in the area. Even a Government agency, the Centre for Geological Research (Geologian tutkimuskeskus) has applied for land reservations on the basis of the Finnish Mining Act. This agency has entered six land reservations of 9 square kilometres each in the immediate vicinity of the Angeli village and partly on the slopes of Mt. Riutusvaara. Two of these land tracts are located within an area which is the subject of a legal controversy about logging activities between the local Samis and the government forestry authorities.

Examination of the merits:

9.1 The Committee has examined the present communication in the light of all the information provided by the parties. The issue to be determined by the Committee is whether quarrying on the flank of Mt. Etelä-Riutusvaara, in the amount that has taken place until the present time or in the amount that would be permissible under the permit issued to the company which has expressed its intention to extract stone from the mountain (i.e. up to a total of 5,000 cubic metres), would violate the authors' rights under article 27 of the Covenant.

9.2 It is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community[19].

9.3 The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant. Furthermore, mountain Riutusvaara continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.

9.4 A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

9.5 The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

9.6 Against this background, the Committee concludes that quarrying on the slopes of Mt. Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

9.7 As far as future activities which may be approved by the authorities are concerned, the Committee further notes that the information available to it indicates that the State party's authorities have endeavoured to permit only quarrying which would minimize the impact on any reindeer herding activity in Southern Riutusvaara and on the environment; the intention to minimize the effects of extraction of stone from the area on reindeer husbandry is reflected in the conditions laid down in the quarrying permit.

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[19] Views on communication No. 197/1985 (Kitok v. Sweden), adopted on 27 July 1988, paragraph 9.2.

Moreover, it has been agreed that such activities should be carried out primarily outside the period used for reindeer pasturing in the area. Nothing indicates that the change in herding methods by the Muotkatunturi Herdsmens' Committee (see paragraph 8.1 above) could not be accommodated by the local forestry authorities and/or the company.

9.8 With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a breach of article 27 or any other provision of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

J. Communication No. 514/1992; Sandra Fei v. Colombia
(Views adopted on 4 April 1995, fifty-third session)[20]

Submitted by:	Mrs. Sandra Fei [represented by counsel]
Victim:	The author
State party:	Colombia
Date of communication:	22 July 1992 (initial submission)
Date of decision on admissibility:	18 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Having concluded its consideration of communication No. 514/1992 submitted to the Human Rights Committee by Mrs. Sandra Fei under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Sandra Fei, of Italian and Colombian citizenship, born in 1957 in Santa Fé de Bogotá and currently residing in Milan, Italy. She claims to be a victim of violations by Colombia of articles 2, paragraphs 2 and 3; 14, paragraphs 1 and 3 (c); 17; 23, paragraph 4; and 24 of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as submitted by the author:

2.1 Mrs. Fei married Jaime Ospina Sardi in 1976; in 1977, rifts between the spouses began to emerge, and in 1981 Mrs. Fei left the home; the two children born from the marriage remained with the husband. The author sought to establish a residence in Bogotá but, as she was unable to obtain more than temporary employment, finally moved to Paris as a correspondent for the daily newspaper 24 Horas.

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[20] Pursuant to rule 85 of the Committee's rules of procedure, Mr. Fausto Pocar did not participate in the adoption of the Committee's Views.

2.2 A Colombian court order dating from 19 May 1982 established a separation and custody arrangement, but divorce proceedings subsequently were also instituted by the author before a Paris tribunal, with the consent of her ex-husband.

2.3 Under the Colombian court order of May 1982, the custody of the children was granted provisionally to the father, with the proviso that custody would go to the mother if the father remarried or cohabited with another woman. It further established joint parental custody and provided for generous visiting rights. Mr. Rodolfo Segovia Salas, a senator of the Republic, brother-in-law of Mr. Ospina Sardi and close family friend, was designated as guarantor of the agreement.

2.4 On 26 September 1985, Mrs. Fei's children, during a visit to her mother, were allegedly kidnapped by the father, with the help of three men said to be employees of the Colombian Embassy in Paris, when the author was leaving her Paris apartment. Between September 1985 and September 1988, the author did not have any contact with her children and knew nothing of their whereabouts, as Mr. Segovia Salas allegedly refused to cooperate. The author obtained the good offices of the French authorities and of the wife of President Mitterrand, but these démarches proved unsuccessful. Mrs. Fei then requested the assistance of the Italian Ministry of Foreign Affairs, which in turn asked for information and judicial assistance from the Colombian authorities. The author alleges that the latter either replied in evasive terms or simply denied that the author's rights had been violated. During the summer of 1988, an official of the Italian Foreign Ministry managed to locate the children in Bogotá. In September 1988, accompanied by the Italian Ambassador to Colombia, the author was finally able to see her two children for five minutes, on the third floor of the American School in Bogotá.

2.5 In the meantime, Mr. Ospina Sardi had himself initiated divorce proceedings in Bogotá, in which he requested the suspension of the author's parental authority as well as an order that would prohibit the children from leaving Colombia. On 13 March 1989, the First Circuit Court of Bogotá (Juzgado Primero Civil del Circuito de Bogotá) handed down its judgement; the author contends that in essence, the judgement confirmed the terms of the separation agreement reached several years earlier. Mrs. Fei further argues that the divorce proceedings in Colombia deliberately ignored the proceedings still pending before the Paris tribunal, as well as the children's dual nationality.

2.6 Mrs. Fei contends that, since September 1985, she has received, and continues to receive, threats. As a result, she claims, she cannot travel to Colombia alone or without protection. In March 1989, therefore, the Italian Foreign Ministry organized a trip to Bogotá for her; after negotiations, she was able to see her children for exactly two hours, "as an exceptional favour". The meeting took place in a small room in Mr. Segovia Salas' home, in the presence of a psychologist who allegedly had sought to obstruct the meeting until the very last moment. Thereafter, the author was only allowed to communicate with her children by telephone or mail; she contends that her letters were frequently tampered with and that it was almost impossible to reach the girls by telephone.

2.7 In May 1989, Mr. Ospina Sardi broke off the negotiations with the author without providing an explanation; only in November 1989 were the Italian authorities informed, upon request, of the "final divorce judgement" of 13 March 1989. Mr. Ospina Sardi refused to comply with the terms of the judgement. On 21 June 1991, Mr. Ospina Sardi filed a request for the revision of the divorce judgement and of the visiting rights granted to the author, on the ground that circumstances had changed and that visiting rights as generous as those agreed upon in 1985 were no longer justifiable in the circumstances; the author contends that she was only informed of those proceedings in early 1992. Mr. Ospina Sardi also requested that the author be refused permission to see the children in Colombia, and that the children should not be allowed to visit their mother in Italy.

2.8 The Italian Foreign Ministry was in turn informed that the matter had been passed on to the office of the Prosecutor-General of Colombia, whose task under article 277 of the Constitution it is, inter alia, to review compliance with judgements handed down by Colombian courts. The Prosecutor-General initially ignored the case and did not investigate it; nor did he initiate criminal proceedings against Mr. Ospina Sardi for contempt of court and non-compliance with an executory judgement. Several months later, he asked for his disqualification in the case, on the grounds that he had "strong bonds of friendship" with Mr. Ospina Sardi; the file was transferred to another magistrate. The Italian authorities have since addressed several complaints to the President of Colombia and to the Colombian Ministries of Foreign Affairs and International Trade, the latter having offered, on an unspecified earlier date, to find a way out of the impasse. No satisfactory reply has been provided by the Colombian authorities.

2.9 The author notes that, during her trips to Colombia in May and June 1992, she could only see her children very briefly and under conditions deemed unacceptable, and never for more than one hour at a time. On the occasion of her last visit to Colombia in March 1993, the conditions under which the visits took place allegedly had become worse, and the authorities attempted to prevent Mrs. Fei from leaving Colombia. Mrs. Fei has now herself instituted criminal proceedings against Mr. Ospina Sardi, for non-compliance with the divorce judgement.

2.10 In 1992 and 1993, the Colombian courts took further action in respect of Mr. Ospina Sardi's request for a revision of parental custody and visiting rights, as well as in respect of complaints filed on behalf of the author in the Supreme Court of Colombia. On 24 November 1992, the Family Law Division (Sala de Familia) of the Superior Court of Bogotá (Tribunal Superior del Distrito Judicial) modified the visiting rights regime in the sense that all contacts between the children and the author outside Colombia were suspended; at the same time, the entire visiting rights regime was pending for review before Family Court No. 19 of Bogotá.

2.11 Mrs. Fei's counsel initiated proceedings in the Supreme Court of Colombia, directed against the Family Court No. 19 of Bogotá, against the office of the Procurator-General and against the judgement of 24 November 1992, for non-observance of the author's constitutional rights. On 9 February 1993, the Civil Chamber of the Supreme

Court (Sala de Casación Civil) set aside operative paragraph 1 of the judgement of 24 November 1992 concerning the suspension of contacts between the author and her children outside Colombia, while confirming the rest of said judgement. At the same time, the Supreme Court transmitted its judgement to Family Judge No. 19, with the request that its observations be taken into account in the proceedings filed by Mr. Ospina Sardi, and to the Constitutional Court.

2.12 On 14 April 1993, Family Court No. 19 of Bogotá handed down its judgement concerning the request for modification of visiting rights. This judgement placed certain conditions on the modalities of the author's visits to her children, especially outside Colombia, inasmuch as the Government of Colombia had to take the measures necessary to guarantee the exit and the re-entry of the children.

2.13 On 28 July 1993, finally, the Constitutional Court partially confirmed and partially modified the judgement of the Supreme Court of 9 February 1993. The judgement is critical of the author's attitude vis-à-vis her children between 1985 and 1989, as it assumes that the author deliberately neglected contact with them between those dates. It denies the author any possibility of a transfer of custody, and appears to hold that the judgement of Family Court No. 19 is final ("no vacila ... en oponer como cosa juzgada la sentencia ... dictada el 14 de abril de 1993"). This, according to counsel, means that the author must start all over again if she endeavours to obtain custody of the children. Finally, the judgement admonishes the author to assume her duties with more responsibility in the future ("Previénese a la demandante ... sobre la necesidad de asumir con mayor responsabilidad los deberes que le corresponden como madre de la niñas").

2.14 In December 1993, the author's children, after presumed pressure from their father, filed proceedings pursuant to article 86 of the Colombian Constitution (acción de tutela; see para. 4.5 below) against their mother. The case was placed before the Superior Tribunal in Bogotá (Tribunal Superior del Distrito Judicial de Santa Fé de Bogotá). Mrs. Fei claims that she was never officially notified of this action. It appears that the Court gave her until 10 January 1994 to present her defence, reserving judgement for 14 January. For an unexplained reason, the hearing was then advanced to the morning of 16 December 1993, with the judgement delivered on the afternoon of the same day. The judgement orders Mrs. Fei to stop publishing her book about her and her children's story (Perdute, Perdidas) in Colombia.

2.15 The author submits that her lawyer was prevented from attending the hearing of 16 December 1993 and from presenting his client's defence. Counsel thereupon filed a complaint based on violations of fundamental rights of the defence with the Supreme Court. On 24 February 1994, the Supreme Court (Sala de Casación Penal) declared, on procedural grounds, that it was not competent to hear the complaint.

2.16 Mrs. Fei notes that apart from the divorce and custody proceedings, her ex-husband has filed complaints for defamation and for perjury/deliberately false testimony against her. She observes that she won the defamation complaint in all instances; furthermore, she has won, on first instance, the perjury complaint against her. This action is pending on appeal. The author submits that these suits were malicious and designed to provide a pretext enabling the authorities to prevent her from leaving Colombia the next time she visits her children.

The complaint:

3.1 The author alleges a violation of article 14, paragraph 1, of the Covenant, in that she was denied equality before the Colombian tribunals. She further contends that the courts have not been impartial in their approach of the case. In this context, it is submitted that just prior to the release of the judgement of the Constitutional Court, press articles carried excerpts of a judgement and statements of a judge on the Court that implied that the Constitutional Court would rule in her favour; inexplicably, the judgement released shortly thereafter went, at least partially, against her.

3.2 The author further alleges that the proceedings have been deliberately delayed by the Colombian authorities and courts, thereby denying her due process. She suspects that the tacitly agreed strategy is simply to prolong proceedings until the date when the children become of age.

3.3 According to the author, the facts as stated above amount to a violation of article 17, on account of the arbitrary and unlawful interferences in her private life or the interference in her correspondence with the children.

3.4 The author complains that Colombia has violated her and her children's rights under article 23, paragraph 4, of the Covenant. In particular, no provision of the protection of the children was made, as required under article 23, paragraph 4 in fine. In this context, the author concedes that her children have suffered through the high exposure that the case has had in the media, both in Colombia and in Italy. As a result, they have become withdrawn. A report and the testimony of a psychologist used during the proceedings before Family Court No. 19 concluded that the children's relationships deteriorated abruptly because of the "publicity campaign" waged against their father; the author observes that this psychologist was hired by her ex-husband after the children returned to Colombia in 1985, that she received instructions as to which treatment was appropriate for the children and that she literally "brainwashed" them.

3.5 The author alleges a violation of article 24, in relation to the children's presumed right to acquire Italian nationality, and their right to equal access to both parents.

3.6 Finally, counsel argues that the Committee should take into account that Colombia also violated articles 9 and 10 of the Convention on the Rights of the Child, which relate to contact between parents and their children. In this context, he notes that the Convention on the Rights of the Child was incorporated into Colombian law by Law No. 12 of 1991, and submits that the courts, in particular Family Court No. 19, failed to apply articles 9 and 10 of the Convention.

3.7 The author submits that whereas some form of domestic remedies may still be available, the pursuit of domestic remedies has already been unduly prolonged within the meaning of article 5, paragraph 2(b), especially if the very nature of the dispute, custody of and access to minor children, is taken into consideration.

The State party's submission on admissibility:

4.1 The State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. It explains the proceedings before Family Court No. 19, which were, at the time of the submission, still pending.

4.2 The State party further observes that if the author had wanted to complain about the non-execution of the separation agreement of 19 May 1982, she could have initiated proceedings under what was then article 335 of the Code of Civil Procedure. It is noted that between 1986 and 13 March 1989, the author did not avail herself of this procedure.

4.3 With regard to the author's attitude between 13 March 1989 and 21 June 1991, the State party appears to endorse the contention of Mr. Ospina Sardi that, during this period, the author did not visit her children in Colombia and only maintained telephone or postal contacts with them. Furthermore, Mrs. Fei did not avail herself of the possibility of an action under article 336 of the Code of Civil Procedure, namely, to request enforcement of the decision of the First Circuit Court of Bogotá. Accordingly, the State party submits, the non-exhaustion of local remedies has two aspects: (a) judicial proceedings remain pending before a family court; and (b) Mrs. Fei did not avail herself of the available procedures under the Code of Civil Procedure.

4.4 Additionally, the State party affirms that it cannot possibly be argued that the author was the victim of a denial of justice since:

(a) The judicial authorities acted diligently and impartially, as demonstrated by the separation agreement of 19 May 1982, the divorce judgement of 13 March 1989 and the proceedings before Family Court No. 19;

(b) The State party's judicial authorities were unaware of the non-compliance with the decisions of May 1982 and March 1989 before 21 June 1991, for the reason that, in civil matters, the courts do not initiate proceedings ex officio but only upon the request of the party or the parties concerned;

(c) No omission or failure to act in the case can be attributed to the judicial authorities of Colombia, notwithstanding the complaints filed by the author's representative against, for example, the office of the Procurator-General.

4.5 The State party points to the availability of a special procedure (Acción de tutela), which is governed by article 86 of the Colombian Constitution of 1991, under which every individual may request the protection of his or her fundamental rights.[21]

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[21] Article 86 of the Constitution stipulates:

> "Toda persona tendrá acción de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por sí misma

4.6 Finally, the State party reiterates that no impediments exist that prevent Mrs. Fei from entering Colombian territory and from initiating the pertinent judicial proceedings in order to vindicate her rights.

The Committee's decision on admissibility:

5.1 In March 1994, the Committee considered the admissibility of the communication. It noted the parties' observations relating to the question of exhaustion of domestic remedies, in particular that proceedings in the case had been initiated in 1982 and that two actions which according to the State party remained available to the author had in the meantime been filed and concluded, without providing the relief sought. The Committee also observed that after more than 11 years of proceedings, judicial disputes about custody of and access to the author's children continued, and concluded that these delays were excessive. It remarked that in custodial disputes and in disputes over access to children upon dissolution of a marriage, judicial remedies should operate swiftly.

5.2 In respect of the claim under article 24, the Committee observed that this violation would have had to be claimed on behalf of the author's children, in whose name the communication had not been submitted. The Committee concluded that this allegation had not been substantiated, for purposes of admissibility.

5.3 As to the claim under article 14, paragraph 3(c), the Committee recalled that the right to be tried without undue delay relates to the determination of criminal charges. As these were not at issue in the author's case, with the exception of those mentioned in paragraph 2.16 above in respect of which delay had not been claimed, the Committee held this claim to be inadmissible ratione materiae, as incompatible with the provisions of the Covenant.

5.4 The Committee considered the remaining allegations under article 14, paragraph 1; 17; and 23, paragraph 4, to be adequately substantiated, for purposes of admissibility. On 18 March 1994, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 14, paragraph 1; 17; and 23, paragraph 4, of the Covenant.

The State party's observations on the merits and the author's comments thereon:

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 28 September 1994, the State party denies that the author's rights under the Covenant have been violated. As to the claim under article 14, paragraph 1, it submits that articles 113,

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> o por quien actue en su nombre, la protección inmediata de sus derechos constitucionales fundamentales ..."

The proceedings leading to the judgement of 28 July 1993 of the Constitutional Court were instituted under article 86 of the Constitution.

116, 228 and 229 of the Colombian Constitution guarantee the independence of the Colombian judiciary. Article 230 guarantees the impartiality of the judges, by stipulating that they are only bound to respect the laws of the country.

6.2 As to the "excessive delays" of the proceedings referred to by the Committee in its admissibility decision, the State party submits that the sole fact that proceedings have lasted for over 12 years does not in itself justify the conclusion that they have been unduly prolonged. It refers to the judgements of the different courts of Bogotá of 1982, 1989, 1992 and 1993 and proceedings initiated by the author's daughters and her ex-husband in December 1993 and June 1994, and contends that in all these proceedings, the principle of equality of arms has been observed, as both parties were equally entitled to file claims and counterclaims and to submit their defence arguments ("... han tenido las mismas oportunidades para iniciar y contestar las acciones ..."). In short, the author is said to have benefited from all available constitutional guarantees and in particular the guarantee of due process, laid down in article 29 of the Constitution.

6.3 The State party observes that if one of the parties does not comply with a judgement or court order in family disputes, the law lays down the procedure to follow to obtain the judgement's or order's enforcement, as well as the penalties for non-compliance with these obligations. In this context, the procedure governed by article 86 of the Constitution becomes relevant, since it enables anyone to seek immediate judicial protection of his/her fundamental rights. The author initiated proceedings under article 86 before the Supreme Court of Colombia, and by judgement of 9 February 1993, the Court reinstated the author's right of access to her daughters.

6.4 To the State party, the above indicates that the Colombian courts treated the author's case on the basis of equality and with the requisite impartiality, that they did so without unnecessary delays and, accordingly, in compliance with their obligations under article 14, paragraph 1, of the Covenant.

6.5 The State party rejects as unfounded the author's claim that Colombian authorities interfered arbitrarily and unlawfully with the author's right to privacy, by making contacts between herself and her children unnecessarily difficult. This claim, according to the State party, has not been sufficiently substantiated. In this context, the State party contends that it always gave the author the guarantees and assurances requested by the intermediary of the Italian Embassy, so as to facilitate her travel to Colombia. This is said to have included protection, if so requested. The State party recalls that no impediments exist, or have ever existed, that would prevent the author from entering Colombian territory to visit her children, or with a view to initiating such judicial proceedings she considers opportune to defend her rights.

6.6 Concerning the allegation under article 23, paragraph 4, the State party submits that the author has failed to substantiate how this provision was violated in her case. It recalls that the parents jointly agreed, in 1982, that custody of and care for the children should remain with Mr. Ospina Sardi; this agreement has been challenged on numerous subsequent occasions before the domestic courts.

6.7 The State party rejects as unfounded the author's claim that it did nothing or not enough to protect the "interests of the children", within the meaning of article 23, paragraph 4. In this context, it refers to articles 30 and 31 of the Minors' Code (Codigo del Minor), which governs the protection of children. Article 31, in particular, stipulates that the State will guarantee the protection of children, on a subsidiary basis, if the parents or legal guardians do not fulfil their role. As no circumstances that would have warranted the application of articles 30 and 31 were ever brought to the attention of the competent Colombian authorities, the State party deduces that the author's daughters never were in a situation in which they would have required the State's intervention.

6.8 Still in the context of article 23, paragraph 4, the State party notes that Colombian legislation stipulates that the rights of children shall prevail over the rights of others. Article 44 of the Constitution lays down a number of fundamental rights that are enjoyed by children. A special jurisdiction for minors is safeguarding those rights.

6.9 The State party recalls that the author's daughters themselves filed proceedings against their mother under article 86 of the Constitution, with a view to enforcing their rights under articles 15, 16, 21, 42 and 44 of the Constitution, inter alia, on the grounds that their mother's highly publicized attempts to re-establish contacts with them, as well as the publication of a book about her tribulations, interfered with their privacy and had caused them serious moral prejudice. By judgement of 16 December 1993, a court in Bogotá (Sala Penal del Tribunal Superior del Distrito Judicial de Santa Fé de Bogotá) ordered the author to refrain from publishing her book (Perdute, Perdidas) in Colombia, as well as from any other activity encroaching upon her daughters' rights. This judgement was confirmed by the Constitutional Court (Corte Constitucional, Sala Quinta de Revisión) on 27 June 1994.

7.1 In her comments, the author reiterates that she did not benefit from equality of arms before the Colombian tribunals. Thus, the procedures initiated by her took exceedingly long to examine and to resolve, whereas the procedures initiated by her ex-husband, either directly or indirectly, were processed immediately and sometimes resolved before the date of the audience initially communicated to the author.

7.2 As an example, the author refers to the proceedings filed by her daughters late in 1993. She insists that she was only notified at the end of January 1994, whereas the delay for the submission of her defence had been set for 10 January 1994, and the audience scheduled for 14 January 1994. Moreover, these dates were wrong, as the audience in fact took place in the morning of 16 December 1993, and judgement was given on the afternoon of the same day.

7.3 The author also refers to the new custody and visiting rights regime decided by the courts in 1992 and 1993, and detailed in paragraphs 2.10 to 2.13 above. Some of these decisions went against her husband, but the author submits that the judicial authorities did not react to his refusal to execute/accept said decisions. For this reason, the author requested the Colombian authorities to guarantee the enforcement of the decisions of Colombian courts, and a magistrate was charged with an investigation into the matter. Months passed before this magistrate asked for his own discharge because of his friendship with Mr. Ospina Sardi, and before another judge was entrusted with the inquiry. The author recalls that the issue has been under inquiry since mid-1992, without any sign of a decision having been taken.

7.4 As to the violation of article 17, the author notes that while she was free to travel to Colombia, she had to arrange herself for her personal protection. The Colombian authorities never assisted her in enforcing her visiting rights. Numerous démarches undertaken to this effect by the Italian Embassy in Bogotá either were left without answer or received dilatory replies. The author submits that by so doing, or by remaining inactive, the State party is guilty of passive interference with her right to privacy.

7.5 Still in the context of article 17, the author contends that on two occasions, the State party arbitrarily interfered with her right to privacy. The first occurred in 1992, on the occasion of one of her visits to Colombia. The author submits that she was not personally notified of proceedings instituted by her ex-husband, and that it required the personal intervention of the Italian Ambassador before the magistrate in charge of the case finally accepted to take her deposition, a few hours before her departure for Italy. The second occurred in 1993 when the Colombian police allegedly tried to prevent her from leaving Colombian territory; again, it took the intervention of the Italian Ambassador before the plane carrying the author was allowed to take off.

7.6 Finally, the author contends that the violation of article 23, paragraph 4, in her case is flagrant. She describes the precarious conditions under which the visits of their daughters took place, out of their home, in the presence of a psychologist hired by Mr. Ospina Sardi, and for extremely short periods of time. The testimonies of Ms. Susanna Agnelli, who accompanied the author during these visits, are said to demonstrate clearly the violation of this provision.

7.7 The author further submits that article 23, paragraph 4, was violated because her daughters were forced to testify against her on several occasions in judicial proceedings initiated by Mr. Ospina Sardi, testimonies that allegedly constituted a serious threat to their mental equilibrium. Furthermore, the procedure filed by the children against the author under article 86 of the Constitution is said to have been prompted by pressure from Mr. Ospina Sardi. This, it is submitted, clearly transpires from the text of the initial deposition: according to the author, it could only have been prepared by a lawyer, but not by a child.

7.8 In a letter dated 5 October 1994, the author's former lawyer draws attention to the judgement of the Constitutional Court of 27 June 1994, which prohibits the publication and circulation of the author's book in Colombia. He contends that this judgement is in clear violation of the Colombian Constitution, which prohibits censorship, and argues that the Court had no jurisdiction to examine the contents of a book that had not been either published or circulated in Colombia at the time of the hearing.

Examination of the merits:

8.1 The Human Rights Committee has examined the communication in the light of all the information, material and court documents provided by the parties. It bases its findings on the considerations set out below.

8.2 The Committee has taken note of the State party's argument that the Colombian judicial authorities acted independently and impartially in the author's case, free from external pressure, that the principle of equality of arms was respected, and that there were no undue delays in the proceedings concerning custody of the author's daughters and visiting rights. The author has refuted these contentions.

8.3 On the basis of the material before it, the Committee has no reason to conclude that the Colombian judicial authorities failed to observe their obligation of independence and impartiality. There is no indication of executive pressure on the different tribunals seized of the case, and one of the magistrates charged with an inquiry into the author's claims indeed requested to be discharged, on account of his close acquaintance with the author's ex-husband.

8.4 The concept of a "fair trial" within the meaning of article 14, paragraph 1, however, also includes other elements. Among these, as the Committee has had the opportunity to point out,[22] are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings. In the present case, the Committee is not satisfied that the requirement of equality of arms and of expeditious procedure have been met. It is noteworthy that every court action instituted by the author took several years to adjudicate - and difficulties in communication with the author, who does not reside in the State party's territory, cannot account for such delays, as she had secured legal representation in Colombia. The State party has failed to explain these delays. On the other hand, actions instituted by the author's ex-husband and by or on behalf of her children were heard and determined considerably more expeditiously. As the Committee has noted in its admissibility decision, the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously. In the Committee's opinion, given the delays in the determination of the author's actions, this has not been the case.

8.5 The Committee has further noted that the State party's authorities have failed to secure the author's ex-husband's compliance with court orders granting the author access to her children, such as the court order of May 1982 or the judgement of the First Circuit Court of Bogotá of 13 March 1989. Complaints from the author about the non-enforcement of such orders apparently continue to be investigated, more than 30 months after they were filed, or remain in abeyance; this is another element indicating that the requirement of equality of arms and of expeditious procedure has not been met.

8.6 Finally, it is noteworthy that in the proceedings under article 86 of the Colombian Constitution instituted on behalf of the author's daughters in December 1993, the hearing took place, and judgement was given, on 16 December 1993, that is, before the expiration of the deadline for the submission of the author's defence statement. The State party has failed to address this point, and the author's version is thus uncontested. In the Committee's opinion, the impossibility for Mrs. Fei to present her arguments before judgement was given was incompatible with the principle of adversary proceedings, and thus contrary to article 14, paragraph 1, of the Covenant.

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[22] Views on communications Nos. 203/1986 (Muñoz v. Peru), para. 11.3; and 207/1986 (Morael v. France), para. 9.3.

8.7 The Committee has noted and accepts the State party's argument that in proceedings which are initiated by the children of a divorced parent, the interests and the welfare of the children are given priority. The Committee does not wish to assert that it is in a better position than the domestic courts to assess these interests. The Committee recalls, however, that when such matters are before a local court that is assessing these matters, the court must respect all the guarantees of fair trial.

8.8 The author has claimed arbitrary and unlawful interferences with her right to privacy. The Committee notes that the author's claim about harassment and threats on the occasions of her visits to Colombia have remained generalized, and the transcript of the court proceedings made available to the Committee do not reveal that this matter was addressed before the courts. Nor has the claim that correspondence with her children was frequently tampered with been further documented. As to the difficulties the author experienced in following the court proceedings before different judicial instances, the Committee notes that even serious inconvenience caused by judicial proceedings to which the author of a communication is a party cannot be qualified as "arbitrary" or "unlawful" interference with that individual's privacy. Finally, there is no indication that the author's honour was unlawfully attacked by virtue of the court proceedings themselves. The Committee concludes that these circumstances do not constitute a violation of article 17.

8.9 As to the alleged violation of article 23, paragraph 4, the Committee recalls that this provision grants, barring exceptional circumstances, a right to regular contact between children and both of their parents upon dissolution of a marriage. The unilateral opposition of one parent generally does not constitute such an exceptional circumstance.[23]

8.10 In the present case, it was the author's ex-husband who sought to prevent the author from maintaining regular contact with her daughters, in spite of court decisions granting the author such access. On the basis of the material made available to the Committee, the father's refusal apparently was justified as being "in the best interest" of the children. The Committee cannot share this assessment. No special circumstances have been adduced that would have justified the restrictions on the author's contacts with her children. Rather, it appears that the author's ex-husband sought to stifle, by all means at his disposal, the author's access to the girls, or to alienate them from her. The severe restrictions imposed by Mrs. Fei's ex-husband on Mrs. Fei's rare meetings with her daughters support this conclusion. Her attempts to initiate criminal proceedings against her ex-husband for non-compliance with the court order granting her visiting rights were frustrated by delay and inaction on the part of the prosecutor's office. In the circumstances, it was not reasonable to expect her to pursue any remedy that may have been available under the Code of Civil Procedure. In the Committee's opinion, in the absence of special circumstances, none of which are discernible in the present case, it cannot be deemed to be in the "best interest" of children virtually to eliminate one parent's access to them. That Mrs. Fei has, since 1992-1993, reduced her attempts to vindicate her right of access cannot, in the Committee's opinion, be held against her. In all the circumstances of the case, the Committee concludes that there has been a violation of article 23, paragraph 4. Furthermore, the failure of the prosecutor's office to ensure the right to permanent contact between the author and her daughters also has entailed a violation of article 17, paragraph 1, of the Covenant.

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[23] Views on case No. 201/1985 (Hendriks v. The Netherlands), adopted on 27 July 1988, para. 10.4.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations by Colombia of articles 14, paragraph 1, and 23, paragraph 4, in conjunction with article 17, paragraph 1, of the Covenant.

10. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the Committee's opinion, this entails guaranteeing the author's regular access to her daughters, and that the State party ensure that the terms of the judgements in the author's favour are complied with. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

K. Communication No. 516/1992; Alina Simunek et al. v. the Czech Republic (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by:	Mrs. Alina Simunek, Mrs. Dagmar Hastings, Tuzilova and Mr. Josef Prochazka
Alleged victims:	The authors and Jaroslav Simunek (Mrs. Alina Simunek's husband)
State party:	The Czech Republic
Date of communication:	17 September 1991 (initial submissions)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of communication No. 516/1992 submitted to the Human Rights Committee by Mrs. Alina Simunek, Mrs. Dagmar Hastings Tuzilova and Mr. Josef Prochazka under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communications are Alina Simunek, who acts on her behalf and on behalf of her husband, Jaroslav Simunek, Dagmar Tuzilova Hastings and Josef Prochazka, residents of Canada and Switzerland, respectively. They claim to be victims of violations of their human rights by the Czech Republic. The Covenant was ratified by Czechoslovakia on 23 December 1975. The Optional Protocol entered into force for the Czech Republic on 12 June 1991[24].

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[24] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991 but, on 31 December 1992, the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

The facts as submitted by the authors:

2.1 Alina Simunek, a Polish citizen born in 1960, and Jaroslav Simunek, a Czech citizen, currently reside in Ontario, Canada. They state that they were forced to leave Czechoslovakia in 1987, under pressure of the security forces of the communist regime. Under the legislation then applicable, their property was confiscated. After the fall of the Communist government on 17 November 1989, the Czech authorities published statements which indicated that expatriate Czech citizens would be rehabilitated in as far as any criminal conviction was concerned, and their property restituted.

2.2 In July 1990, Mr. and Mrs. Simunek returned to Czechoslovakia in order to submit a request for the return of their property, which had been confiscated by the District National Committee, a State organ, in Jablonece. It transpired, however, that between September 1989 and February 1990, all their property and personal effects had been evaluated and auctioned off by the District National Committee. Unsaleable items had been destroyed. On 13 February 1990, the authors' real estate was transferred to the Jablonece Sklarny factory, for which Jaroslav Simunek had been working for twenty years.

2.3 Upon lodging a complaint with the District National Committee, an arbitration hearing was convened between the authors, their witnesses and representatives of the factory on 18 July 1990. The latter's representatives denied that the transfer of the authors' property had been illegal. The authors thereupon petitioned the office of the district public prosecutor, requesting an investigation of the matter on the ground that the transfer of their property had been illegal, since it had been transferred in the absence of a court order or court proceedings to which the authors had been parties. On 17 September 1990, the Criminal Investigations Department of the National Police in Jablonece launched an investigation; its report of 29 November 1990 concluded that no violation of (then) applicable regulations could be ascertained, and that the authors' claim should be dismissed, as the Government had not yet amended the former legislation.

2.4 On 2 February 1991, the Czech and Slovak Federal Government adopted Act 87/1991, which entered into force on 1 April 1991. It endorses the rehabilitation of Czech citizens who had left the country under communist pressure and lays down the conditions for restitution or compensation for loss of property. Under Section 3, subsection 1, of the Act, those who had their property turned into State ownership in the cases specified in Section 6 of the Act are entitled to restitution, but only if they are citizens of the Czech and Slovak Federal Republic and are permanent residents in its territory.

2.5 Under Section 5, subsection 1, of the Act, anyone currently in (illegal) possession of the property shall restitute it to the rightful owner, upon a written request from the latter, who must also prove his or her claim to the property and demonstrate how the property was turned over to the State. Under subsection 2, the request for restitution must be submitted to the individual in possession of the property, within six months of the entry into force of the Act. If the person in possession of the property does not comply with the request, the rightful owner may submit his or her claim to the competent tribunal, within one year of the date of entry into force of the Act (subsection 4).

2.6 With regard to the issue of exhaustion of domestic remedies, it appears that the authors have not submitted their claims for restitution to the local courts, as required under Section 5, subsection 4, of the Act. It transpires from their submissions that they consider this remedy ineffective, as they do not fulfil the requirements under Section 3, subsection 1. Alina Simunek adds that they have lodged complaints with the competent municipal, provincial and federal authorities, to no avail. She also notes that the latest correspondence is a letter from the Czech President's Office, dated 16 June 1992, in which the author is informed that the President's Office cannot intervene in the matter, and that only the tribunals are competent to pronounce on the matter. The author's subsequent letters remained without reply.

2.7 Dagmar Hastings Tuzilova, an American citizen by marriage and currently residing in Switzerland, emigrated from Czechoslovakia in 1968. On 21 May 1974, she was sentenced in absentia to a prison term as well as forfeiture of her property, on the ground that she had 'illegally emigrated' from Czechoslovakia. Her property, 5/18 shares of her family's estate in Pilsen, is currently held by the Administration of Houses in this city.

2.8 By decision of 4 October 1990 of the District Court of Pilsen, Dagmar Hastings Tuzilova was rehabilitated; the District Court's earlier decision, as well as all other decisions in the case, were declared null and void. All her subsequent applications to the competent authorities and a request to the Administration of Houses in Pilsen to negotiate the restitution of her property have, however, not produced any tangible result.

2.9 Apparently, the Administration of Housing agreed, in the spring of 1992, to transfer the 5/18 of the house back to her, on the condition that the State notary in Pilsen agreed to register this transaction. The State notary, however, has so far refused to register the transfer. At the beginning of 1993, the District Court of Pilsen confirmed the notary's action (Case No. 11 Co. 409/92). The author states that she was informed that she could appeal this decision, via the District Court in Pilsen, to the Supreme Court. She apparently filed an appeal with the Supreme Court on 7 May 1993, but no decision had been taken as of 20 January 1994.

2.10 On 16 March 1992, Dagmar Hastings Tuzilova filed a civil action against the Administration of Houses, pursuant to Section 5, subsection 4, of the Act. On 25 May 1992, the District Court of Pilsen dismissed the claim, on the ground that, as an American citizen residing in Switzerland, she was not entitled to restitution within the meaning of Section 3, subsection 1, of Act 87/1991. The author contends that any appeal against this decision would be ineffective.

2.11 Josef Prochazka is a Czech citizen born in 1920, who currently resides in Switzerland. He fled from Czechoslovakia in August 1968, together with his wife and two sons. In the former Czechoslovakia, he owned a house with two three-bedroom apartments and a garden, as well as another plot of land. Towards the beginning of 1969, he donated his property, in the appropriate form and with the consent of the authorities, to his father. By judgments of a district court of July and September 1971, he, his wife and sons were sentenced to prison terms on the grounds of "illegal emigration" from Czechoslovakia. In 1973, Josef Prochazka's father died; in his will, which was recognized as valid by the authorities, the author's sons inherited the house and other real estate.

2.12 In 1974, the court decreed the confiscation of the author's property, because of his and his family's "illegal emigration", in spite of the fact that the authorities had, several years earlier, recognized as lawful the transfer of the property to the author's father. In December 1974, the house and garden were sold, according to the author at a ridiculously low price, to a high party official.

2.13 By decisions of 26 September 1990 and of 31 January 1991, respectively, the District Court of Ustí rehabilitated the author and his sons as far as their criminal conviction was concerned, with retroactive effect. This means that the court decisions of 1971 and 1974 (see paragraphs 2.11 and 2.12 above) were invalidated.

The complaint:

3.1 Alina and Jaroslav Simunek contend that the requirements of Act 87/1991 constitute unlawful discrimination, as it only applies to "pure Czechs living in the Czech and Slovak Federal Republic". Those who fled the country or were forced into exile by the ex-communist regime must take a permanent residence in Czechoslovakia to be eligible for restitution or compensation. Alina Simunek, who lived and worked in Czechoslovakia for eight years, would not be eligible at all for restitution, on account of her Polish citizenship. The authors claim that the Act in reality legalizes former Communist practices, as more than 80% of the confiscated property belongs to persons who do not meet these strict requirements.

3.2 Alina Simunek alleges that the conditions for restitution imposed by the Act constitute discrimination on the basis of political opinion and religion, without however substantiating her claim.

3.3 Dagmar Hastings Tuzilova claims that the requirements of Act 87/1991 constitute unlawful discrimination, contrary to article 26 of the Covenant.

3.4 Josef Prochazka also claims that he is a victim of the discriminatory provisions of Act 87/1991; he adds that as the court decided, with retroactive effect, that the confiscation of his property was null and void, the law should not be applied to him at all, as he never lost his legal title to his property, and because there can be no question of 'restitution' of the property.

The Committee's admissibility decision:

4.1 On 26 October 1993, the communications were transmitted to the State party under rule 91 of the rules of procedure of the Human Rights Committee. No submission under rule 91 was received from the State party, despite a reminder addressed to it. The authors were equally requested to provide a number of clarifications; they complied with this request by letters of 25 November 1993 (Alina and Jaroslav Simunek), 3 December 1993 and 11/12 April 1994 (Josef Prochazka) and 19 January 1994 (Dagmar Hastings

Tuzilova).

4.2 At its 51st session the Committee considered the admissibility of the communication. It noted with regret the State party's failure to provide information and observations on the question of the admissibility of the communication. Notwithstanding this absence of cooperation on the part of the State party, the Committee proceeded to ascertain whether the conditions of admissibility under the Optional Protocol had been met.

4.3 The Committee noted that the confiscation and sale of the property in question by the authorities of Czechoslovakia occurred in the 1970's and 1980's. Irrespective of the fact that all these events took place prior to the date of entry into force of the Optional Protocol for the Czech Republic, the Committee recalled that the right to property, as such, is not protected by the Covenant.

4.4 The Committee observed, however, that the authors complained about the discriminatory effect of the provisions of Act 87/1991, in the sense that they apply only to persons unlawfully stripped of their property under the former regime who now have a permanent residence in the Czech Republic and are Czech citizens. Thus the question before the Committee was whether the law could be deemed discriminatory within the meaning of article 26 of the Covenant.

4.5 The Committee observed that the State party's obligations under the Covenant applied as of the date of its entry into force. A different issue arose as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol was engaged. In its jurisprudence under the Optional Protocol, the Committee has consistently held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.

4.6 While the authors in the present case have had their criminal convictions quashed by Czech tribunals, they still contend that Act No. 87/1991 discriminates against them, in that in the case of two of the applicants (Mr. and Mrs. Simunek; Mrs. Hastings Tuzilova), they cannot benefit from the law because they are not Czech citizens or have no residence in the Czech Republic, and that in the case of the third applicant (Mr. Prochazka), the law should not have been deemed applicable to his situation at all.

5. On 22 July 1994 the Human Rights Committee therefore decided that the communication was admissible in as much as it may raise issues under articles 14, paragraph 6, and 26 of the Covenant.

The State party's explanations

6.1 In its submission, dated 12 December 1994, the State party argues that the legislation in question is not discriminatory. It draws the Committee's attention to the fact that according to article 11, Section 2, of the Charter of Fundamental Rights and

Freedoms, which is part of the Constitution of the Czech Republic, "... the law may specify that some things may be owned exclusively by citizens or by legal persons having their seat in the Czech Republic."

6.2 The State party affirms its commitment to the settlement of property claims by restitution of properties to persons injured during the period of 25 February 1948 to 1 January 1990. Although certain criteria had to be stipulated for the restitution of confiscated properties, the purpose of such requirements is not to violate human rights. The Czech Republic cannot and will not dictate to anybody where to live. Restitution of confiscated property is a very complicated and de facto unprecedented measure and therefore it cannot be expected to rectify all damages and to satisfy all the people injured by the Communist regime.

7.1 With respect to the communication submitted by Mrs. Alina Simunek the State party argues that the documents submitted by the author do not define the claims clearly enough. It appears from her submission that Mr. Jaroslav Simunek was probably kept in prison by the State Security Police. Nevertheless, it is not clear whether he was kept in custody or actually sentenced to imprisonment. As concerns the confiscation of the property of Mr. and Mrs. Simunek, the communication does not define the measure on the basis of which they were deprived of their ownership rights. In case Mr. Simunek was sentenced for a criminal offence mentioned in Section 2 or Section 4 of Law No. 119/1990 on judicial rehabilitation as amended by subsequent provisions, he could claim rehabilitation under the law or in review proceedings and, within three years of the entry into force of the court decision on his rehabilitation, apply to the Compensations Department of the Ministry of Justice of the Czech Republic for compensation pursuant to Section 23 of the above-mentioned Law. In case Mr. Simunek was unlawfully deprived of his personal liberty and his property was confiscated between 25 February 1948 and 1 January 1990 in connection with a criminal offence mentioned in Section 2 and Section 4 of the Law but the criminal proceedings against him were not initiated, he could apply for compensation on the basis of a court decision issued at the request of the injured party and substantiate his application with the documents which he had at his disposal or which his legal adviser obtained from the archives of the Ministry of the Interior of the Czech Republic.

7.2 As concerns the restitution of the forfeited or confiscated property, the State party concludes from the submission that Alina and Jaroslav Simunek do not comply with the requirements of Section 3 (1) of Law No. 87/1991 on extrajudicial rehabilitations, namely the requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Consequently, they cannot be recognized as persons entitled to restitution. Remedy would be possible only in case at least one of them complied with both requirements and applied for restitution within 6 months from the entry into force of the law on extrajudicial rehabilitations (i.e. by the end of September 1991).

8.1 With respect to the communication of Mrs. Dagmar Hastings-Tuzilova the State party clarifies that Mrs. Dagmar Hastings-Tuzilova claims the restitution of the 5/18 shares of house No. 2214 at Cechova 61, Pilsen, forfeited on the basis of the ruling of the Pilsen District Court of 21 May 1974, by which she was sentenced for the criminal offence of illegal emigration according to Section 109 (2) of the Criminal Law. She was rehabilitated pursuant to Law No. 119/1990 on judicial rehabilitations by the ruling of the Pilsen District Court of 4 October 1990. She applied for restitution of her share of the estate in Pilsen pursuant to Law No. 87/1991 on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova concluded an agreement on the restitution with the Administration of Houses in Pilsen, which the State Notary in Pilsen refused to register due to the fact that she did not comply with the conditions stipulated by Section 3 (1) of the law on extrajudicial rehabilitations.

8.2 Mrs. Hastings-Tuzilova, although rehabilitated pursuant to the law on judicial rehabilitations, cannot be considered entitled person as defined by Section 19 of the law on extrajudicial rehabilitations, because on the date of application she did not comply with the requirements of Section 3 (1) of the above-mentioned law, i.e. requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Moreover, she failed to fulfil the requirements within the preclusive period stipulated by Section 5 (2) of the law on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova acquired Czech citizenship and registered her permanent residence on 30 September 1992.

8.3 Section 20 (3) of the law on extrajudicial rehabilitations says that the statutory period for the submission of applications for restitution based on the sentence of forfeiture which was declared null and void after the entry into force of the law on extrajudicial rehabilitations starts on the day of the entry into force of the annulment. Nevertheless, this provision cannot be applied in the case of Mrs. Hastings-Tuzilova due to the fact that her judicial rehabilitation entered into force on 9 October 1990, i.e. before the entry into force of Law No. 87/1991 on extrajudicial rehabilitations (1 April 1991).

9.1 With respect to the communication of Mr. Josef Prochazka the State party argues that Section 3 of Law No. 87/1991 on extrajudicial rehabilitations defines the entitled person, i.e. the person who could within the statutory period claim the restitution of property or compensation. Applicants who did not acquire citizenship of the Czech and Slovak Federal Republic and register their permanent residence on its territory before the end of the statutory period determined for the submission of applications (i.e. before 1 October 1991 for applicants for restitution and before 1 April 1992 for applicants for compensation) are not considered entitled persons.

9.2 From Mr. Prochazka's submission the State party concludes that the property devolved to the State on the basis of the ruling of the Usti nad Labem District Court of 1974 which declared the 1969 deed of gift null and void for the reason that the donor left the territory of the former Czechoslovak Socialist Republic. Such cases are provided for in Section 6 (1) (f) of the law on extrajudicial rehabilitations which defined the entitled person as the transferee according to the invalidated deed, i.e. in this case the entitled person is the unnamed father of Mr. Prochazka. Consequently, the persons to whom the sentence of forfeiture invalidated under Law No. 119/1990 on judicial rehabilitations applies, cannot be regarded as entitled persons, as Mr. Prochazka incorrectly assumes.

9.3 With regard to the fact that the above-mentioned father of Mr. Prochazka died before the entry into force of the law on extrajudicial rehabilitations, the entitled persons are the testamentary heirs - Mr. Prochazka's sons Josef Prochazka and Jiri Prochazka, provided that they were citizens of the former Czech and Slovak Federal Republic and had permanent residence on its territory. The fact that they were rehabilitated pursuant to the law on judicial rehabilitations has no significance in this case. From Mr. Prochazka's submission the State party concludes that Josef Prochazka and Jiri Prochazka are Czech citizens but live in Switzerland and did not apply for permanent residence in the Czech Republic.

Authors' comments on the State party's submissions

10.1 By letter of 21 February 1995, Alina and Jaroslav Simunek contend that the State party has not addressed the issues raised by their communication, namely the compatibility of Act No. 87/1991 with the non-discrimination requirement of article 26 of the Covenant. They claim that Czech hard-liners are still in office and that they have no interest in the restitution of confiscated properties, because they themselves benefited from the confiscations. A proper restitution law should be based on democratic principles and not allow restrictions that would exclude former Czech citizens and Czech citizens living abroad.

10.2 By letter of 12 June 1995 Mr. Prochazka informed the Committee that by order of the District Court of 12 April 1995 the plot of land he inherited from his father will be returned to him (paragraph 2.11).

10.3 Mrs. Hastings Tuzilova had not submitted comments by the time of the consideration of the merits of this communication by the Committee.

Examination of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 This communication was declared admissible only insofar as it may raise issues under article 14, paragraph 6, and article 26 of the Covenant. With regard to article 14, paragraph 6, the Committee finds that the authors have not sufficiently substantiated their allegations and that the information before it does not sustain a finding of a violation.

11.3 As the Committee has already explained in its decision on admissibility (para. 4.3 above), the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant.

11.4 The issue before the Committee is whether the application of Act 87/1991 to the authors entailed a violation of their rights to equality before the law and to the equal protection of the law. The authors claim that this Act, in effect, reaffirms the earlier discriminatory confiscations. The Committee observes that the confiscations themselves are not here at issue, but rather the denial of a remedy to the authors, whereas other claimants have recovered their properties or received compensation therefor.

11.5 In the instant cases, the authors have been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens and residents of the Czech Republic. The question before the Committee, therefore, is whether these preconditions to restitution or compensation are compatible with the non-discrimination requirement of article 26 of the Covenant. In this context the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant[25]. A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

11.6 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the authors' original entitlement to the property in question and the nature of the confiscations. The State party itself acknowledges that the confiscations were discriminatory, and this is the reason why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the authors' original entitlement to their respective properties was not predicated either on citizenship or residence, the Committee finds that the conditions of citizenship and residence in Act 87/1991 are unreasonable. In this connection the Committee notes that the State party has not advanced any grounds which would justify these restrictions. Moreover, it has been submitted that the authors and many others in their situation left Czechoslovakia because of their political opinions and that their property was confiscated either because of their political opinions or because of their emigration from the country. These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.

11.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory.

11.8 In the light of the above considerations, the Committee concludes that Act 87/1991 has had effects upon the authors that violate their rights under article 26 of the Covenant.

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the denial of restitution or compensation to the authors constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

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[25] Zwaan de Vries v. The Netherlands, Communication No. 182/1984, Views adopted on 9 April 1987, para. 13.

12.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which may be compensation if the properties in question cannot be returned. To the extent that partial restitution of Mr. Prochazka's property appears to have been or may soon be effected (para. 10.2), the Committee welcomes this measure, which it deems to constitute partial compliance with these Views. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

12.3 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

L. Communication No. 518/1992; Jong-Kyu Sohn v. the Republic of Korea (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by:	Jong-Kyu Sohn (represented by counsel)
Victim:	The author
State party:	Republic of Korea
Date of communication:	7 July 1992 (initial submission)
Date of decision on admissibility:	18 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of communication No. 518/1992 submitted to the Human Rights Committee on behalf of Mr. Jong-Kyu Sohn under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1 The author of the communication is Mr. Jong-Kyu Sohn, a citizen of the Republic of Korea, residing at Kwangju, Republic of Korea. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author:

2.1 The author has been president of the Kumho Company Trade Union since 27 September 1990 and is a founding member of the Solidarity Forum of Large Company Trade Unions. On 8 February 1991, a strike was called at the Daewoo Shipyard Company at Guhjae Island in the province of Kyungsang-Nam-Do. The Government announced that it would send in police troops to break the strike. Following that announcement, the author had a meeting, on 9 February 1991, with other members of the Solidarity Forum, in Seoul, 400 kilometres from the place where the strike took place. At the end of the meeting they issued a statement supporting the strike and condemning the Government's threat to send in troops. That statement was transmitted to the workers at the Daewoo Shipyard by facsimile. The Daewoo Shipyard strike ended peacefully on 13 February 1991.

2.2 . On 10 February 1991, the author, together with some 60 other members of the Solidarity Forum, was arrested by the police when leaving the premises where the meeting had been held. On 12 February 1991, he and six others were charged with contravening article 13(2) of the Labour Dispute Adjustment Act (Law No. 1327 of 13 April 1963, amended by Law No. 3967 of 28 November 1987), which prohibits others than the concerned employer, employees or trade union, or persons having legitimate authority attributed to them by law, to intervene in a labour dispute for the purpose of manipulating or influencing the parties concerned. He was also charged with contravening the Act on Assembly and Demonstration (Law No. 4095 of 29 March 1989), but notes that his communication relates only to the Labour Dispute Adjustment Act. One of the author's co-accused later died in detention, according to the author under suspicious circumstances.

2.3 On 9 August 1991, a single judge of the Seoul Criminal District Court found the author guilty as charged and sentenced him to one and a half years' imprisonment and three years' probation. The author's appeal against his conviction was dismissed by the Appeal Section of the same court on 20 December 1991. The Supreme Court rejected his further appeal on 14 April 1992. The author submits that, since the Constitutional Court had declared, on 15 January 1990, that article 13(2) of the Labour Dispute Adjustment Act was compatible with the Constitution, he has exhausted domestic remedies.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The omplaint:

3.1 The author argues that article 13(2) of the Labour Dispute Adjustment Act is used to punish support for the labour movement and to isolate the workers. He argues that the provision has never been used to charge those who take the side of management in a labour dispute. He further claims that the vagueness of the provision, which prohibits any act to influence the parties, violates the principle of legality (nullum crimen, nulla poena sine lege).

3.2 The author further argues that the provision was incorporated into the law to deny the right to freedom of expression to supporters of labourers or trade unions. In this respect, he makes reference to the Labour Union Act, which prohibits third party support for the organization of a trade union. He concludes that any support to labourers or trade unions may thus be punished, by the Labour Dispute Adjustment Act at the time of strikes and by the Labour Union Act at other times.

3.3 The author claims that his conviction violates article 19, paragraph 2, of the Covenant. He emphasizes that the way he exercised his freedom of expression did not infringe the rights or reputations of others, nor did it threaten national security or public order, or public health or morals.

The State party's observations on admissibility and author's comments thereon:

4.1 By submission of 9 June 1993, the State party argues that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. The State party submits that available domestic remedies in a criminal case are exhausted only when the Supreme Court has issued a judgement on appeal and when the Constitutional Court has reached a decision on the constitutionality of the law on which the judgement is based.

4.2 As regards the author's argument that he has exhausted domestic remedies because the Constitutional Court has already declared that article 13(2) of the Labour Dispute Adjustment Act, on which his conviction was based, is constitutional, the State party contends that the prior decision of the Constitutional Court only examined the compatibility of the provision with the right to work, the right to equality and the principle of legality, as protected by the Constitution. It did not address the question of whether the article was in compliance with the right to freedom of expression.

4.3 The State party argues, therefore, that the author should have requested a review of the law in the light of the right to freedom of expression, as protected by the Constitution. Since he failed to do so, the State party argues that he has not exhausted domestic remedies.

4.4 The State party submits, in addition, that the author's sentence was revoked on 6 March 1993, under a general amnesty granted by the President of the Republic of Korea.

5.1 In his comments on the State party's submission, the author maintains that he has exhausted all domestic remedies and that it would be futile to request the Constitutional Court to pronounce itself on the constitutionality of the Labour Dispute Adjustment Act when it has done so in the recent past.

5.2 The author submits that if the question of constitutionality of a legal provision is brought before the Constitutional Court, the Court is legally obliged to take into account all possible grounds that may invalidate the law. As a result, the author argues that it is futile to bring the same question to the Court again.

5.3 In this context, the author notes that, although the majority opinion in the judgement of the Constitutional Court of 15 January 1990 did not refer to the right to freedom of expression, two concurring opinions and one dissenting opinion did. He submits that it is clear therefore that the Court did in fact consider all the grounds for possible unconstitutionality of the Labour Dispute Adjustment Act, including a possible violation of the constitutional right to freedom of expression.

The Committee's admissibility decision:

6.1 At its 50th session, the Committee considered the admissibility of the communication. After having examined the submissions of both the State party and the author concerning the constitutional remedy, the Committee found that the compatibility of article 13(2) of the Labour Dispute Adjustment Act with the Constitution, including the constitutional right to freedom of expression, had necessarily been before the

Constitutional Court in January 1990, even though the majority judgement chose not to refer to the right to freedom of expression. In the circumstances, the Committee considered that a further request to the Constitutional Court to review article 13(2) of the Act, by reference to freedom of expression, did not constitute a remedy which the author still needed to exhaust under article 5, paragraph 2, of the Optional Protocol.

6.2 The Committee noted that the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given, and considered that the facts as submitted by the author might raise issues under article 19 of the Covenant which should be examined on the merits. Consequently, the Committee declared the communication admissible.

The State party's observations on the merits and author's comments thereon:

7.1 By submission of 25 November 1994, the State party takes issue with the Committee's consideration when declaring the communication admissible that "the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given". The State party emphasizes that the author not only attended the meeting of the Solidarity Forum on 9 February 1991, but also actively participated in distributing propaganda on 10 or 11 February 1991 and, on 11 November 1990, was involved in a violent demonstration, during which Molotov cocktails were thrown.

7.2 The State party submits that because of these offences, the author was charged with and convicted of violating articles 13(2) of the Labour Dispute Adjustment Act and 45(2) of the Act on Assembly and Demonstration.

7.3 The State party explains that the articles of the Labour Dispute Adjustment Act, prohibiting intervention by third parties in a labour dispute, are meant to maintain the independent nature of a labour dispute between employees and employer. It points out that the provision does not prohibit counselling or giving advice to the parties involved.

7.4 The State party invokes article 19, paragraph 3, of the Covenant, which provides that the right to freedom of expression may be subject to certain restrictions inter alia for the protection of national security or of public order.

7.5 The State party reiterates that the author's sentence was revoked on 6 March 1993, under a general amnesty.

8.1 In his comments, the author states that, although it is true that he was sentenced for his participation in the demonstration of November 1990 under the Act on Assembly and Demonstration, this does not form part of his complaint. He refers to the judgment of the Seoul Criminal District Court of 9 August 1991, which shows that the author's participation in the November demonstration was a crime punished separately, under the Act on Assembly and Demonstration, from his participation in the activities of the Solidarity Forum and his support for the strike of the Daewoo Shipyard Company in February 1991, which were punished under the Labour Dispute Adjustment Act. The author states that the two incidents are unrelated to each other. He reiterates that his complaint only regards the "prohibition of third party intervention", which he claims is in violation of the Covenant.

8.2 The author argues that the Spate party's interpretation of the freedom of expression as guaranteed in the Covenant is too narrow. He refers to paragraph 2 of article 19, which includes the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The author argues therefore that the distribution of leaflets containing the Solidarity Forum's statements supporting the strike at the Daewoo Shipyard falls squarely within the right to freedom of expression. He adds that he did not distribute the statements himself, but only transmitted them by telefax to the striking workers at the Daewoo Shipyard.

8.3 As regards the State party's argument that his activity threatened national security and public order, the author notes that the State party has not specified what part of the statements of the Solidarity Forum threatened public security and public order and for what reasons. He contends that a general reference to public security and public order does not justify the restriction of his freedom of expression. In this connection he recalls that the statements of the Solidarity Forum contained arguments for the legitimacy of the strike concerned, strong support for the strike and criticism of the employer and of the Government for threatening to break the strike by force.

8.4 The author denies that the statements by the Solidarity Forum posed a threat to the national security and public order of South Korea. It is stated that the author and the other members of the Solidarity Forum are fully aware of the sensitive situation in terms of South Korea's confrontation with North Korea. The author cannot see how the expression of support for the strike and criticism of the employer and the government in handling the matter could threaten national security. In this connection the author notes that none of the participants in the strike was charged with breaching the National Security Law. The author states that in the light of the constitutional right to strike, police intervention by force can be legitimately criticised. Moreover, the author argues that public order was not threatened by the statements given by the Solidarity Forum, but that, on the contrary, the right to express one's opinion freely and peacefully enhances public order in a democratic society.

8.5 The author points out that solidarity among workers is being prohibited and punished in the Republic of Korea, purportedly in order to "maintain the independent nature of a labour dispute", but that intervention in support of the employer to suppress workers' rights is being encouraged and protected. He adds that the Labour Dispute Adjustment Act was enacted by the Legislative Council for National Security, which was instituted in 1980 by the military government to replace the National Assembly. It is argued that the laws enacted and promulgated by this undemocratic body do not constitute laws within the meaning of the Covenant, enacted in a democratic society.

8.6 The author notes that the Committee of Freedom of Association of the International Labour Organization has recommended that the Government repeal the provision prohibiting the intervention by a third party in labour disputes, because of its incompatibility with the ILO constitution, which guarantees workers' freedom of expression as an essential component of the freedom of association.[26]

8.7 Finally, the author points out that the amnesty has not revoked the guilty judgment against him, nor compensated him for the violations of his Covenant rights, but merely lifted residual restrictions imposed upon him as a result of his sentence, such as the restriction on his right to run for public office.

9.1 By further submission of 20 June 1995, the State party explains that the labour movement in the Republic of Korea can be generally described as being politically oriented and ideologically influenced. In this connection it is stated that labour activists in Korea do not hesitate in leading workers to extreme actions by using force and violence and engaging in illegal strikes in order to fulfil their political aims or carry out their ideological principles. Furthermore, the State party argues that there have been frequent instances where the idea of a proletarian revolution has been implanted in the minds of workers.

9.2 The State party argues that if a third party interferes in a labour dispute to the extent that the third party actually manipulates, instigates or obstructs the decisions of workers, such a dispute is being distorted towards other objectives and goals. The State party explains therefore that, in view of the general nature of the labour movement, it has felt obliged to maintain the law concerning the prohibition of third party intervention.

9.3 Moreover, the State party submits that in the instant case, the written statement distributed in February 1991 to support the Daewoo Shipyard Trade Union was used as a disguise to incite a nation-wide strike of all workers. The State party argues that "in the case where a national strike would take place, in any country, regardless of its security situation, there is considerable reason to believe that the national security and public order of the nation would be threatened."

9.4 As regards the enactment of the Labour Dispute Adjustment Act by the Legislative Council for National Security, the State party argues that, through the revision of the constitution, the effectiveness of the laws enacted by the Council was acknowledged by public consent. The State party moreover argues that the provision concerning the prohibition of the third party intervention is being applied fairly to both the labour and the management side of a dispute. In this connection the State party refers to a case currently before the courts against someone who intervened in a labour dispute on the side of the employer.

Issues and proceedings before the Committee:

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

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[26] 294th Report of the Committee on Freedom of Association, June 1994, paragraphs 218 to 274. See also the 297th Report, March-April 1995, paragraph 23.

10.2 The Committee has taken note of the State party's argument that the author participated in a violent demonstration in November 1990, for which he was convicted under the Act on Assembly and Demonstration. The Committee has also noted that the author's complaint does not concern this particular conviction, but only his conviction for having issued the statement of the Solidarity Forum in February 1991. The Committee considers that the two convictions concern two different events, which are not related. The issue before the Committee is therefore only whether the author's conviction under article 13, paragraph 2, of the Labour Dispute Adjustment Act for having joined in issuing a statement supporting the strike at the Daewoo Shipyard Company and condemning the Government's threat to send in troops to break the strike violates article 19, paragraph 2, of the Covenant.

10.3 Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that the author, by joining others in issuing a statement supporting the strike and criticizing the Government, was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13(2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13(2) of the Labour Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has

been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

M. Communication No. 539/1993; Keith Cox v. Canada (Views adopted on 31 October 1994, fifty-second session)[27]

Submitted by:	Keith Cox [represented by counsel]
Victim:	The author
State party:	Canada
Date of communication:	4 January 1993 (initial submission)
Date of decision on admissibility:	3 November 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 1994,

Having concluded its consideration of communication No. 539/1993 submitted to the Human Rights Committee by Keith Cox under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Keith Cox, a citizen of the United States of America born in 1952, currently detained at a penitentiary in Montreal and facing extradition to the United States. He claims to be a victim of violations by Canada of articles 6, 7, 14 and 26 of the International Covenant on Civil and Political Rights. The author had submitted an earlier communication which was declared inadmissible because of non-exhaustion of domestic remedies on 29 July 1992.[28]

The facts as submitted by the author:

2.1 On 27 February 1991, the author was arrested at Laval, Québec, for theft, a charge to which he pleaded guilty. While in custody, the judicial authorities received from the United States a request for his extradition, pursuant to the 1976 Extradition Treaty between Canada and the United States. The author is wanted in the State of Pennsylvania on two charges of first-degree murder, relating to an incident that took place in Philadelphia in 1988. If convicted, the author could face the death penalty, although the two other accomplices were tried and sentenced to life terms.

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[27] The texts of 8 individual opinions, signed by 13 Committee members, are appended to the present document.

[28] CCPR/C/45/D/486/1993.

2.2 Pursuant to the extradition request of the United States Government and in accordance with the Extradition Treaty, the Superior Court of Québec, on 26 July 1991, ordered the author's extradition to the United States of America. Article 6 of the Treaty provides:

> "When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed".

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act.

2.4 Concerning the course of the proceedings against the author, it is stated that a habeas corpus application was filed on his behalf on 13 September 1991; he was represented by a legal aid representative. The application was dismissed by the Superior Court of Québec. The author's representative appealed to the Court of Appeal of Québec on 17 October 1991. On 25 May 1992, he abandoned his appeal, considering that, in the light of the Court's jurisprudence, it was bound to fail.

2.5 Counsel requests the Committee to adopt interim measures of protection because extradition of the author to the United States would deprive the Committee of its jurisdiction to consider the communication, and the author to properly pursue his communication.

The complaint:

3. The author claims that the order to extradite him violates articles 6, 14 and 26 of the Covenant; he alleges that the way death penalties are pronounced in the United States generally discriminates against black people. He further alleges a violation of article 7 of the Covenant, in that he, if extradited and sentenced to death, would be exposed to "the death row phenomenon", i.e. years of detention under harsh conditions, awaiting execution.

Interim measures:

4.1 On 12 January 1993 the Special Rapporteur on New Communications requested the State party, pursuant to rule 86 of the Committee's rules of procedure, to defer the author's extradition until the Committee had had an opportunity to consider the admissibility of the issues placed before it.

4.2 At its forty-seventh session the Committee decided to invite both the author and the State party to make further submissions on admissibility.

The State party's observations:

5.1 The State party, in its submission, dated 26 May 1993, submits that the communication should be declared inadmissible on the grounds that extradition is beyond the scope of the Covenant, or alternatively that, even if in exceptional circumstances the Committee could examine questions relating to extradition, the present communication is not substantiated, for purposes of admissibility.

5.2 With regard to domestic remedies, the State party explains that extradition is a two step process under Canadian law. The first step involves a hearing at which a judge examines whether a factual and legal basis for extradition exists. The judge considers inter alia the proper authentication of materials provided by the requesting State, admissibility and sufficiency of evidence, questions of identity and whether the conduct for which the extradition is sought constitutes a crime in Canada for which extradition can be granted. In the case of fugitives wanted for trial, the judge must be satisfied that the evidence is sufficient to warrant putting the fugitive on trial. The person sought for extradition may submit evidence at the judicial hearing, after which the judge decides whether the fugitive should be committed to await surrender to the requesting State.

5.3 Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of habeas corpus in a provincial court. A decision of the judge on the habeas corpus application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada.

5.4 The second step of the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister, and counsel for the fugitive may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers the case record from the judicial phase, together with any written and oral submissions from the fugitive, the relevant treaty terms which pertain to the case to be decided and the law on extradition. While the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. A fugitive, subject to an extradition request, cannot be surrendered unless the Minister of Justice orders the fugitive surrendered and, in any case, not until all available avenues for judicial review of the Minister's decision, if pursued, are completed. For extradition requests before 1 December 1992, including the author's request, the Minister's decision is reviewable either by way of an application for a writ of habeas corpus in a provincial court or by way of judicial review in the Federal Court pursuant to section 18 of the Federal Court Act. As with appeals against a warrant of committal, appeals against a review of the warrant of surrender can be pursued, with leave, up to the Supreme Court of Canada.

5.5 The courts can review the Minister's decision on jurisdictional grounds, i.e. whether the Minister acted fairly, in an administrative law sense, and for its consistency with the Canadian constitution, in particular, whether the Minister's decision is consistent with Canada's human rights obligations.

5.6 With regard to the exercise of discretion in seeking assurances before extradition, the State party explains that each extradition request from the United States, in which the possibility exists that the person sought may face the imposition of the death penalty, must be considered by the Minister of Justice and decided on its own particular facts. "Canada does not routinely seek assurances with respect to the non-imposition of the death penalty. The right to seek assurances is held in reserve for use only where exceptional circumstances exist. This policy ... is in application of article 6 of the Canada-United States Extradition Treaty. The Treaty was never intended to make the seeking of assurances a routine occurrence. Rather, it was the intention of the parties to the Treaty that assurances with respect to the death penalty should only be sought in circumstances where the particular facts of the case warrant a special exercise of the discretion. This policy represents a balancing of the rights of the individual sought for extradition with the need for the protection of the people of Canada. This policy reflects ... Canada's understanding of and respect for the criminal justice system of the United States."

5.7 Moreover, the State party refers to a continuing flow of criminal offenders from the United States into Canada and a concern that, unless such illegal flow is discouraged, Canada could become a safe haven for dangerous offenders from the United States, bearing in mind that Canada and the United States share a 4,800 kilometre unguarded border. In the last twelve years there has been an increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had grown to 88, including requests involving death penalty cases, which were becoming a new and pressing problem. "A policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty would encourage even more criminal offenders, especially those guilty of the most serious crimes, to flee the United States into Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

6.1 As to the specific facts of the instant communication, the State party indicates that Mr. Cox is a black male, 40 years of age, of sound mind and body, an American citizen with no immigration status in Canada. He is charged in the state of Pennsylvania with two counts of first degree murder, one count of robbery and one count of criminal conspiracy to commit murder and robbery, going back to an incident that occurred in Philadelphia, Pennsylvania in 1988, where two teenage boys were killed pursuant to a plan to commit robbery in connection with illegal drug trafficking. Three men, one of whom is alleged to be Mr. Cox, participated in the killings. In Pennsylvania, first degree murder is punishable by death or a term of life imprisonment. Lethal injection is the method of execution mandated by law.

6.2 With regard to the exhaustion of domestic remedies, the State party indicates that Mr. Cox was ordered committed to await extradition by a judge of the Quebec Superior Court on 26 July 1991. This order was challenged by the author in an application for habeas corpus before the Quebec Superior Court. The application was dismissed on 13 September 1991. Mr. Cox then appealed to the Quebec Court of Appeal, and, on 18 February 1992, before exhausting domestic remedies in Canada, he submitted a communication to the Committee, which was registered under No. 486/1992. Since the extradition process had not yet progressed to the second stage, the communication was ruled inadmissible by the Committee on 26 July 1992.

6.3 On 25 May 1992, Mr. Cox withdrew his appeal to the Quebec Court of Appeal, thus concluding the judicial phase of the extradition process. The second stage, the ministerial phase, began. He petitioned the Minister of Justice asking that assurances be sought that the death penalty would not be imposed. In addition to written submissions, counsel for the author appeared before the Minister and made oral representations. "It was alleged that the judicial system in the state of Pennsylvania was inadequate and discriminatory. He submitted materials which purported to show that the Pennsylvania system of justice as it related to death penalty cases was characterized by inadequate legal representation of impoverished accused, a system of assignment of judges which resulted in a 'death penalty court', selection of jury members which resulted in 'death qualified juries' and an overall problem of racial discrimination. The Minister of Justice was of the view that the concerns based on alleged racial discrimination were premised largely on the possible intervention of a specific prosecutor in the state of Pennsylvania who, according to officials in that state, no longer has any connection with his case. It was alleged that, if returned to face possible imposition of the death penalty, Mr. Cox would be exposed to the 'death row phenomenon'. The Minister of Justice was of the view that the submissions indicated that the conditions of incarceration in the state of Pennsylvania met the constitutional standards of the United States and that situations which needed improvement were being addressed ... it was argued that assurances be sought on the basis that there is a growing international movement for the abolition of the death penalty... The Minister of Justice, in coming to the decision to order surrender without assurances, concluded that Mr. Cox had failed to show that his rights would be violated in the state of Pennsylvania in any way particular to him, which could not be addressed by judicial review in the United States Supreme Court under the Constitution of the United States. That is, the Minister determined that the matters raised by Mr. Cox could be left to the internal working of the United States system of justice, a system which sufficiently corresponds to Canadian concepts of justice and fairness to warrant entering into and maintaining the Canada-United States Extradition Treaty." On 2 January 1993, the Minister, having determined that there existed no exceptional circumstances pertaining to the author which necessitated the seeking of assurances in his case, ordered him surrendered without assurances.

6.4 On 4 January 1993, author's counsel sought to reactivate his earlier communication to the Committee. He has indicated to the Government of Canada that he does not propose to appeal the Minister's decision in the Canadian courts. The State party, however, does not contest the admissibility of the communication on this issue.

7.1 As to the scope of the Covenant, the State party contends that extradition per se is beyond its scope and refers to the travaux préparatoires, showing that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. "It was argued that the inclusion of a provision on extradition in the Covenant would cause difficulties regarding the relationship of the Covenant to existing treaties and bilateral agreements." (A/2929, Chapt. VI, para. 72) In the light of the history of negotiations during the drafting of the Covenant, the State party submits "that a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto, would stretch the principles governing the interpretation of the Covenant, and of human rights instruments in general, in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation."

7.2 As to the author's standing as a "victim" under article 1 of the Optional Protocol, the State party concedes that he is subject to Canada's jurisdiction during the time he is in Canada in the extradition process. However, the State party submits "that Cox is not a victim of any violation in Canada of rights set forth in the Covenant ... because the Covenant does not set forth any rights with respect to extradition. In the alternative, it contends that even if [the] Covenant extends to extradition, it can only apply to the treatment of the fugitive sought for extradition with respect to the operation of the extradition process within the State Party to the Protocol. Possible treatment of the fugitive in the requesting State cannot be the subject of a communication with respect to the State Party to the Protocol (extraditing State), except perhaps for instances where there was evidence before that extraditing State such that a violation of the Covenant in the requesting State was reasonably foreseeable."

7.3 The State party contends that the evidence submitted by author's counsel to the Committee and to the Minister of Justice in Canada does not show that it was reasonably foreseeable that the treatment that the author may face in the United States would violate his rights under the Covenant. The Minister of Justice and the Canadian Courts, to the extent that the author availed himself of the opportunities for judicial review, considered all the evidence and argument submitted by counsel and concluded that Mr. Cox's extradition to the United States to face the death penalty would not violate his rights, either under Canadian law or under international instruments, including the Covenant. Thus, the State party concludes that the communication is inadmissible because the author has failed to substantiate, for purposes of admissibility, that the author is a victim of any violation in Canada of rights set forth in the Covenant.

Counsel's submissions on admissibility:

8.1 In his submission of 7 April 1993, author's counsel argues that an attempt to further exhaust domestic remedies in Canada would be futile in the light of the judgment of the Canadian Supreme Court in the cases of Kindler and Ng. "I chose to file the communication and apply for interim measures prior to discontinuing the appeal. This move was taken because I presumed that a discontinuance in the appeal might result in the immediate extradition of Mr. Cox It was more prudent to seize the Committee first, and then discontinue the appeal, and I think this precaution was a wise one, because Mr. Cox is still in Canada... Subsequent to discontinuation of the appeal, I filed an application before the Minister of Justice, Kim Campbell, praying that she exercise her discretionary power under article 6 of the Extradition Act, and refuse to extradite Mr. Cox until an assurance had been provided by the United States government that if Mr. Cox were to be found guilty, the death penalty would not be applied... I was granted a hearing before Minister Campbell, on November 13, 1992. In reasons dated January 2, 1993 Minister Campbell refused to exercise her discretion and refused to seek assurances from the United States government that the death penalty not be employed... It is possible to apply for judicial review of the decision of Minister Campbell, on the narrow grounds of breach of natural justice or other gross irregularity. However, there is no suggestion of any grounds to justify such recourse, and consequently no such dilatory recourse has been taken ... all useful and effective domestic remedies to contest the extradition of Mr. Cox have been exhausted."

8.2 Counsel contends that the extradition of Mr. Cox would expose him to the real and present danger of:

> "a. arbitrary execution, in violation of article 6 of the Covenant;
>
> b. discriminatory imposition of the death penalty, in violation of articles 6 and 26 of the Covenant;
>
> c. imposition of the death penalty in breach of fundamental procedural safeguards, specifically by an impartial jury (the phenomenon of 'death qualified' juries), in violation of articles 6 and 14 of the Covenant;
>
> d. prolonged detention on 'death row', in violation of article 7 of the Covenant."

8.3 With respect to the system of criminal justice in the United States, author's counsel refers to the reservations which the United States formulated upon its ratification of the Covenant, in particular to article 6: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Author's counsel argues that this is "an enormously broad reservation that no doubt is inconsistent with the nature and purpose of the treaty but that furthermore ... creates a presumption that the United States does not intend to respect article 6 of the Covenant."

9.1 In his comments, dated 10 June 1993, on the State party's submission, counsel addresses the refusal of the Minister to seek assurances on the non-imposition of the death penalty, and refers to the book La Forest's Extradition to and from Canada, in which it is stated that Canada in fact routinely seeks such an undertaking. Moreover, the author contests the State party's interpretation that it was not the intention of the drafters of the extradition treaty that assurances be routinely sought. "It is known that the provision in the extradition treaty with the United States was added at the request of the United States. Does Canada have any evidence admissible in a court of law to support such a questionable claim? I refuse to accept the suggestion in the absence of any serious evidence."

9.2 As to the State party's argument that extradition is intended to protect Canadian society, author's counsel challenges the State party's belief that a policy of routinely seeking guarantees will encourage criminal law offenders to seek refuge in Canada and contends that there is no evidence to support such a belief. Moreover, with regard to Canada's concern that if the United States does not give assurances, Canada would be unable to extradite and have to keep the criminal without trial, author's counsel argues that "a state government so devoted to the death penalty as a supreme punishment for an offender would surely prefer to obtain extradition and keep the offender in life imprisonment rather than to see the offender freed in Canada. I know of two cases where the guarantee was sought from the United States, one for extradition from the United Kingdom to the state of Virginia (Soering) and one for extradition from Canada to the state of Florida (O'Bomsawin). In both cases the states willingly gave the guarantee. It is pure demagogy for Canada to raise the spectre of 'a haven for many fugitives from the death penalty' in the absence of evidence."

9.3 As to the murders of which Mr. Cox was accused, author's counsel indicates that "two individuals have pleaded guilty to the crime and are now serving life prison terms in Pennsylvania. Each individual has alleged that the other individual actually committed the murder, and that Keith Cox participated."

9.4 With regard to the scope of the Covenant, counsel refers to the travaux préparatoires of the Covenant and argues that consideration of the issue of extradition must be placed within the context of the debate on the right to asylum, and claims that extradition was in fact a minor point in the debates. Moreover, "nowhere in the summary records is there evidence of a suggestion that the Covenant would not apply to extradition requests when torture or cruel, inhuman and degrading punishment might be imposed... Germane to the construction of the Covenant, and to Canada's affirmations about the scope of human rights law, is the more recent Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides, in article 3, that States parties shall not extradite a person to another State where there are serious grounds to believe that the person will be subjected to torture... It is respectfully submitted that it is appropriate to construe articles 7 and 10 of the Covenant in light of the more detailed provisions in the Convention Against Torture. Both instruments were drafted by the same organization, and are parts of the same international human rights system. The Convention Against Torture was meant to give more detailed and specialized protection; it is an enrichment of the Covenant."

9.5 As to the concept of victim under the Optional Protocol, author's counsel contends that this is not a matter for admissibility but for the examination of the merits.

Issues and proceedings before the Committee:

10.1 Before considering any claims contained in a communication, the Human Rights

Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 With regard to the requirement of the exhaustion of domestic remedies, the Committee noted that the author did not complete the judicial phase of examination, since he withdrew the appeal to the Court of Appeal after being advised that it would have no prospect of success and, therefore, that legal aid would not be provided for that purpose. With regard to the ministerial phase, the author indicated that he did not intend to appeal the Minister's decision to surrender Mr. Cox without seeking assurances, since, as he asserts, further recourse to domestic remedies would have been futile in the light of the 1991 judgment of the Canadian Supreme Court in Kindler and Ng[29]. The Committee noted that the State party had explicitly stated that it did not wish to express a view as to whether the author had exhausted domestic remedies and did not contest the admissibility of the communication on this ground. In the circumstances, basing itself on the information before it, the Committee concluded that the requirements of article 5, paragraph 2(b), of the Covenant had been met.

10.3 Extradition as such is outside the scope of application of the Covenant (communication No. 117/1981 [M.A. v. Italy], paragraph 13.4: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country"). Extradition is an important instrument of cooperation in the administration of justice, which requires that safe havens should not be provided for those who seek to evade fair trial for criminal offences, or who escape after such fair trial has occurred. But a State party's obligation in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant[30]. In the present case the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. The Committee finds that the communication is thus not excluded from consideration ratione materiae.

10.4 With regard to the allegations that, if extradited, Mr. Cox would be exposed to a real and present danger of a violation of articles 14 and 26 of the Covenant in the United States, the Committee observed that the evidence submitted did not substantiate, for purposes of admissibility, that such violations would be a foreseeable and necessary consequence of extradition. It does not suffice to assert before the Committee that the criminal justice system in the United States is incompatible with the Covenant. In this connection, the Committee recalled its jurisprudence that, under the Optional Protocol procedure, it cannot examine in abstracto the compatibility with the Covenant of the laws and practice of a State.[31] For purposes of admissibility, the author has to substantiate that in the specific circumstances of his case, the Courts in Pennsylvania would be likely to violate his rights under articles 14 and 26, and that he would not have a genuine opportunity to challenge such violations in United States courts. The author has failed to do so. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

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[29] The Supreme Court found that the decision of the Minister to extradite Mr. Kindler and Mr. Ng without seeking assurances that the death penalty would not be imposed or, if imposed, would not be carried out, did not violate their rights under the Canadian Charter of Rights and Freedoms.

[30] See the Committee's decisions in communications Nos. 35/1978 (Aumeeruddy-Cziffra *et al.* v. Mauritius, Views adopted on 9 April 1981) and 291/1988 (Torres v. Finland, Views adopted on 2 April 1990).

10.5 The Committee considered that the remaining claim, that Canada violated the Covenant by deciding to extradite Mr. Cox without seeking assurances that the death penalty would not be imposed, or if imposed, would not be carried out, may raise issues under articles 6 and 7 of the Covenant which should be examined on the merits.

11. On 3 November 1993, the Human Rights Committee decided that the communication was admissible in so far as it may raise issues under articles 6 and 7 of the Covenant. The Committee reiterated its request to the State party, under rule 86 of the Committee's rules of procedure, that the author not be extradited while the Committee is examining the merits of the communication.

State party's request for review of admissibility and submission on the merits:

12.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party maintains that the communication is inadmissible and requests the Committee to review its decision of 3 November 1993. The State party also submits its response on the merits of the communication.

12.2 With regard to the notion of "victim" within the meaning of article 1 of the Optional Protocol, the State Party indicates that Mr. Keith Cox has not been convicted of any crime in the United States, and that the evidence submitted does not substantiate, for purposes of admissibility, that violations of articles 6 and 7 of the Covenant would be a foreseeable and necessary consequence of his extradition.

12.3 The State party explains the extradition process in Canada, with specific reference to the practice in the context of the Canada-United States Extradition Treaty. It elaborates on the judicial phase, which includes a methodical and thorough evaluation of the facts of each case. After the exhaustion of the appeals in the judicial phase, a second phase of review follows, in which the Minister of Justice is charged with the responsibility of deciding whether to surrender the person for extradition, and in capital cases, whether the facts of the particular case justify seeking assurances that the death penalty will not be imposed. Throughout this process the fugitive can present his arguments against extradition, and his counsel may appear before the Minister to present oral argument both on the question of surrender and, where applicable, on the seeking of assurances. The Minister's decision is also subject to judicial review. In numerous cases, the Supreme Court of Canada has had occasion to review the exercise of the ministerial discretion on surrender, and has held that the right to life and the right not to be deprived thereof except in accordance with the principles of fundamental justice, apply to ministerial decisions on extradition.

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[31] Views in communication No. 61/1979, Leo Hertzberg *et al.* v. Finland, para. 9.3.

12.4 With regard to the facts particular to Mr. Keith Cox, the State party reviews his submissions before the Canadian courts, the Minister of Justice (see paras. 6.2 and 6.3 supra) and before the Committee and concludes that the evidence adduced fails to show how Mr. Cox satisfies the criterion of being a "victim" within the meaning of article 1 of the Optional Protocol. Firstly, it has not been alleged that the author has already suffered any violation of his Covenant rights; secondly, it is not reasonably foreseeable that he would become a victim after extradition to the United States. The State party cites statistics from the Pennsylvania District Attorney's Office and indicates that since 1976, when Pennsylvania's current death penalty law was enacted, no one has been put to death; moreover, the Pennsylvania legal system allows for several appeals. But not only has Mr. Cox not been tried, he has not been convicted, nor sentenced to death. In this connection the State party notes that the two other individuals who were alleged to have committed the crimes together with Mr. Cox were not given death sentences but are serving life sentences. Moreover, the death penalty is not sought in all murder cases. Even if sought, it cannot be imposed in the absence of aggravating factors which must outweigh any mitigating factors. Referring to the Committee's jurisprudence in the Aumeeruddy-Cziffra case that the alleged victim's risk be "more than a theoretical possibility", the State party states that no evidence has been submitted to the Canadian courts or to the Committee which would indicate a real risk of his becoming a victim. The evidence submitted by Mr. Cox is either not relevant to him or does not support the view that his rights would be violated in a way that he could not properly challenge in the courts of Pennsylvania and of the United States. The State party concludes that since Mr. Cox has failed to substantiate, for purposes of admissibility, his allegations, the communication should be declared inadmissible under article 2 of the Optional Protocol.

13.1 As to the merits of the case, the State party refers to the Committee's Views in the Kindler and Ng cases, which settled a number of matters concerning the application of the Covenant to extradition cases.

13.2 As to the application of article 6, the State party relies on the Committee's view that paragraph 1 (right to life) must be read together with paragraph 2(imposition of the death penalty), and that a State party would violate paragraph 6, paragraph 1, if it extradited a person to face possible imposition of the death penalty in a requesting State where there was a real risk of a violation of paragraph 6, paragraph 2.

13.3 Whereas Mr. Cox alleges that he would face a real risk of a violation of article 6 of the Covenant because the United States "does not respect the prohibition on the execution of minors", the State party indicates that Mr. Cox is over 40 years of age. As to the other requirements of article 6, paragraph 2, of the Covenant, the State party indicates that Mr. Cox is charged with murder, which is a very serious criminal offence, and that if the death sentence were to be imposed on him, there is no evidence suggesting that it would not be pursuant to a final judgment rendered by a court.

13.4 As to hypothetical violations of Mr. Cox's rights to a fair trial, the State party recalls that the Committee declared the communication inadmissible with respect to articles 14 and 26 of the Covenant, since the author had not substantiated his allegations for purposes of admissibility. Moreover, Mr. Cox has not shown that he would not have a genuine opportunity to challenge such violations in the courts of the United States.

13.5 As to article 7 of the Covenant, the State party first addresses the method of judicial execution in Pennsylvania, which is by lethal injection. This method was recently provided for by the Pennsylvania legislature, because it was considered to inflict the least suffering. The State party further indicates that the Committee, in its decision in the Kindler case, which similarly involved the possible judicial execution by lethal injection in Pennsylvania, found no violation of article 7.

13.6 The State party then addresses the submissions of counsel for Mr. Cox with respect to alleged conditions of detention in Pennsylvania. It indicates that the material submitted is out of date and refers to recent substantial improvements in the Pennsylvania prisons, particularly in the conditions of incarceration of inmates under sentence of death. At present these prisoners are housed in new modern units where cells are larger than cells in other divisions, and inmates are permitted to have radios and televisions in their cells, and to have access to institutional programs and activities such as counselling, religious services, education programs, and access to the library.

13.7 With regard to the so-called "death row phenomenon", the State party distinguishes the facts of the Cox case from those in the Soering v. United Kingdom judgment of the European Court of Justice. The decision in Soering turned not only on the admittedly bad conditions in some prisons in the state of Virginia, but also on the tenuous state of health of Mr. Soering. Mr. Cox has not been shown to be in a fragile mental or physical state. He is neither a youth, nor elderly. In this connection, the State party refers to the Committee's jurisprudence in the Vuolanne v. Finland case, where it held that "the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."[32]

13.8 As to the effects of prolonged detention, the State party refers to the Committee's jurisprudence that the "death row phenomenon" does not violate article 7, if it consists only of prolonged periods of delay on death row while appellate remedies are pursued. In the case of Mr. Cox, it is not at all clear that he will reach death row or that he will remain there for a lengthy period of time pursuing appeals.

Author's comments:

14.1 In his comments on the State party's submission, counsel for Mr. Cox stresses that the state of Pennsylvania has stated in its extradition application that the death penalty is being sought. Accordingly, the prospect of execution is not so very remote.

14.2 With regard to article 7 of the Covenant, author's counsel contends that the use of plea bargaining in a death penalty case meets the definition of torture. "What Canada is admitting ... is that Mr. Cox will be offered a term of life imprisonment instead of the death penalty if he pleads guilty. In other words, if he admits to the crime he will avoid the physical suffering which is inherent in imposition of the death penalty."

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[32] Views in communication No. 265/1987, Vuolanne v. Finland, para. 9.2.

14.3 As to the method of execution, author's counsel admits that no submissions had been made on this subject in the original communication. Nevertheless, he contends that execution by lethal injection would violate article 7 of the Covenant. He argues, on the basis of a deposition by Professor Michael Radelet of the University of Florida, that there are many examples of "botched" executions by lethal injection.

14.4 As to the "death row phenomenon", counsel for Mr. Cox specifically requests that the Committee reconsider its case law and conclude that there is a likely violation of article 7 in Mr. Cox's case, since "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years."

14.5 Although the Committee declared the communication inadmissible as to articles 14 and 26 of the Covenant, author's counsel contends that article 6 of the Covenant would be violated if the death penalty were to be imposed "arbitrarily" on Mr. Cox because he is black. He claims that there is systemic racism in the application of the death penalty in the United States.

Merits:

15. The Committee has taken note of the State party's information and arguments on admissibility, submitted after the Committee's decision of 3 November 1993. It observes that no new facts or arguments have been submitted that would justify a reversal of the Committee's decision on admissibility. Therefore, the Committee proceeds to the examination of the merits.

16.1 With regard to a potential violation by Canada of article 6 of the Covenant if it were to extradite Mr. Cox to face the possible imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its Views on communications Nos. 470/1991 (Kindler v. Canada) and 469/1991 (Chitat Ng v. Canada). Namely, for States that have abolished capital punishment and are called to extradite a person to a country where that person may face the imposition of the death penalty, the extraditing State must ensure that the person is not exposed to a real risk of a violation of his rights under article 6 in the receiving State. In other words, if a State party to the Covenant takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. In this context, the Committee also recalls its General Comment on Article 6[33], which provides that while States parties are not obliged to abolish the death penalty, they are obliged to limit its use.

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[33] General Comment No. 6/16 of 27 July 1982, para. 6.

16.2 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada, while not itself imposing the death penalty on Mr. Cox, is asked to extradite him to the United States, where he may face capital punishment. If Mr. Cox were to be exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would entail a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Cox is to be tried for complicity in two murders, undoubtedly very serious crimes. He was over 18 years of age when the crimes were committed. The author has not substantiated his claim before the Canadian courts or before the Committee that trial in the Pennsylvania courts with the possibility of appeal would not be in accordance with his right to a fair hearing as required by the Covenant.

16.3 Moreover, the Committee observes that the decision to extradite Mr. Cox to the United States followed proceedings in the Canadian courts at which Mr. Cox's counsel was able to present argument. He was also able to present argument at the ministerial phase of the proceedings, which themselves were subject to appeal. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition without assurances that the death penalty would not be imposed.

16.4 The Committee notes that Canada itself, save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the domestic abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility. The Committee notes the reasons given by Canada not to seek assurances in Mr. Cox's case, in particular, the absence of exceptional circumstances, the availability of due process in the state of Pennsylvania, and the importance of not providing a safe haven for those accused of or found guilty of murder.

16.5 While States parties must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee finds that Canada's decision to extradite without assurances was not taken arbitrarily or summarily. The evidence before the Committee reveals that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances.

16.6 The Committee notes that the author claims that the plea bargaining procedures, by which capital punishment could be avoided if he were to plead guilty, further violates his rights under the Covenant. The Committee finds this not to be so in the context of the criminal justice system in Pennsylvania.

16.7 With regard to the allegations of systemic racial discrimination in the United States criminal justice system, the Committee does not find, on the basis of the submissions before it, that Mr. Cox would be subject to a violation of his rights by virtue of his colour.

17.1 The Committee has futher considered whether in the specific circumstances of this case, being held on death row would constitute a violation of Mr. Cox's rights under article 7 of the Covenant. While confinement on death row is necessarily stressful, no specific factors relating to Mr. Cox's mental condition have been brought to the attention of the Committee. The Committee notes also that Canada has submitted specific information about the current state of prisons in Pennsylvania, in particular with regard to the facilities housing inmates under sentence of death, which would not appear to violate article 7 of the Covenant.

17.2 As to the period of detention on death row in reference to article 7, the Committee notes that Mr. Cox has not yet been convicted nor sentenced, and that the trial of the two accomplices in the murders of which Mr. Cox is also charged did not end with sentences of death but rather of life imprisonment. Under the jurisprudence of the Committee[34], on the one hand, every person confined to death row must be afforded the opportunity to pursue all possibilities of appeal, and, on the other hand, the State party must ensure that the possibilities for appeal are made available to the condemned prisoner within a reasonable time. Canada has submitted specific information showing that persons under sentence of death in the state of Pennsylvania are given every opportunity to avail themselves of several appeal instances, as well as opportunities to seek pardon or clemency. The author has not adduced evidence to show that these procedures are not made available within a reasonable time, or that there are unreasonable delays which would be imputable to the State. In these circumstances, the Committee finds that the extradition of Mr. Cox to the United States would not entail a violation of article 7 of the Covenant.

17.3 With regard to the method of execution, the Committee has already had the opportunity of examining the Kindler case, in which the potential judicial execution by lethal injection was not found to be in violation of article 7 of the Covenant.

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[34] Views in communications Nos. 210/1986 and 225/1987, Earl Pratt and Ivan Morgan v. Jamaica, para. 13.6; No. 250/1987, Carlton Reid v. Jamaica, para. 11.6; Nos. 270/1988 and 271/1988, Randolph Barrett and Clyde Sutcliffe v. Jamaica, para. 8.4; No. 274/1988, Loxley Griffith v. Jamaica, para. 7.4; No. 317/1988, Howard Martin v. Jamaica, para. 12.1; No. 470/1991, Kindler v. Canada, para. 15.2.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not sustain a finding that the extradition of Mr. Cox to face trial for a capital offence in the United States would constitute a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

A. Individual Opinions appended to the Committee's decision on admissibility of 3 November 1993

1. Individual opinion by Mrs. Rosalyn Higgins, co-signed by Messrs. Laurel Francis, Kurt Herndl, Andreas Mavrommatis, Birame Ndiaye and Waleed Sadi (dissenting)

We believe that this case should have been declared inadmissible. Although extradition as such is outside the scope of the Covenant (see M.A. v. Italy, communication No. 117/1981, decision of 10 April 1984, paragraph 13.4), the Committee has explained, in its decision on communication No. 470/1991 (Joseph J. Kindler v. Canada, Views adopted on 30 July 1993), that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant.

But here, as elsewhere, the admissibility requirements under the Optional Protocol must be met. In its decision on Kindler, the Committee addressed the issue of whether it had jurisdiction, ratione loci, by reference to article 2 of the Optional Protocol, in an extradition case that brought into play other provisions of the Covenant. It observed that "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant" (paragraph 6.2).

We do not see on what jurisdictional basis the Committee proceeds to its finding that the communication is admissible under articles 6 and 7 of the Covenant. The Committee finds that the communication is inadmissible by reference to article 2 of the Optional Protocol (paragraph 10.4) insofar as claims relating to fair trial (article 14) and discrimination before the law (article 26) are concerned. We agree. But this negative finding cannot form a basis for admissibility in respect of articles 6 and 7. The Committee should have applied the same test ("foreseeable and necessary consequences") to the claims made under articles 6 and 7, before simply declaring them admissible in respect of those articles. It did not do so - and in our opinion could not have found, in the particular circumstances of the case, a proper legal basis for jurisdiction had it done so.

The above test is relevant also to the admissibility requirement, under article 1 of the Optional Protocol, that an author be a "victim" of a violation in respect of which he brings a claim. In other words, it is not always necessary that a violation already have occurred for an action to come within the scope of article 1. But the violation that will affect him personally must be a "necessary and foreseeable consequence" of the action of the defendant State.

It is clear that in the case of Mr. Cox, unlike in the case of Mr. Kindler, this test is not met. Mr. Kindler had, at the time of the Canadian decision to extradite him, been tried in the United States for murder, found guilty as charged and recommended to the death sentence by the jury. Mr. Cox, by contrast, has not yet been tried and a fortiori has not been found guilty or recommended to the death penalty. Already it is clear that his extradition would not entail the possibility of a "necessary and foreseeable consequence of a violation of his rights" that would require examination on the merits. This failure to meet the test of "prospective victim" within the meaning of article 1 of the Optional Protocol is emphasized by the fact that Mr. Cox's two co-defendants in the case in which he has been charged have already been tried in the State of Pennsylvania, and sentenced not to death but to a term of life imprisonment.

The fact that the Committee - and rightly so in our view - found that Kindler raised issues that needed to be considered on their merits, and that the admissibility criteria were there met, does not mean that every extradition case of this nature is necessarily admissible. In every case, the tests relevant to articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol must be applied to the particular facts of the case.

The Committee has not at all addressed the requirements of article 1 of the Optional Protocol, that is, whether Mr. Cox may be considered a "victim" by reference to his claims under articles 14, 26, 6 or 7 of the Covenant.

We therefore believe that Mr. Cox was not a "victim" within the meaning of article 1 of the Optional Protocol, and that his communication to the Human Rights Committee is inadmissible.

The duty to address carefully the requirements for admissibility under the Optional Protocol is not made the less necessary because capital punishment is somehow involved in a complaint.

For all these reasons, we believe that the Committee should have found the present communication inadmissible.

Rosalyn Higgins
Laurel Francis
Kurt Herndl
Andreas Mavrommatis
Birame Ndiaye
Waleed Sadi

[Original: English]

2. Individual opinion by Mrs. Elizabeth Evatt (dissenting)

For his claim to be admissible, the author must show that he is a victim. To do this he must submit facts which support the conclusion that his extradition exposed him to a real risk that his rights under articles 6 and 7 of the Covenant would be violated (in the sense that the violation is necessary and foreseeable). The author in the present case has not done so.

As to article 6, the author is, of course, exposed by his extradition to the risk of facing the death penalty for the crime of which he is accused. But he has not submitted facts to show a real risk that the imposition of the death penalty would itself violate article 6, which does not exclude the death penalty in certain limited circumstances. Furthermore, his accomplices in the crime he is charged with were sentenced to life imprisonment, a factor which does not support the contention that the author's extradition would expose him to a "necessary and foreseeable" risk that the death penalty will be imposed.

As to article 7, the claim that the author has been exposed to a real risk of a violation of this provision by his extradition is based on the death row phenomenon (paragraph 8.2); the author has not, however, submitted facts which, in the light of the Committee's jurisprudence, show that there is a real risk of violation of this article if he is extradited to the United States. Furthermore, since, in my opinion, the author's extradition does not expose him to a real risk of being sentenced to death, his extradition entails a fortiori no necessary and foreseeable consequence of a violation of his rights while on death row.

For these reasons I am of the view that the communication is inadmissible under articles 1 and 2 of the Optional Protocol.

Elizabeth Evatt

[Original: English]

B. Individual Opinions appended to the Committee's Views

1. Individual opinion by Messrs. Kurt Herndl and Waleed Sadi (concurring)

We concur with the Committee's finding that the facts of the instant case do not reveal a violation of either article 6 or 7 of the Covenant.

In our opinion, however, it would have been more consistent with the Committee's jurisprudence to set aside the decision on admissibility of 3 November 1993 and to declare the communication inadmissible under articles 1 and 2 of the Optional Protocol, on grounds that the author does not meet the "victim" test established by the Committee. Bearing in mind that Mr. Cox has not been tried, let alone convicted or sentenced to death, the hypothetical violations alleged appear quite remote for the purpose of considering this communication admissible.

However, since the Committee has proceeded to an examination of the merits, we would like to submit the following considerations on the scope of articles 6 and 7 of the Covenant and their application in the case of Mr. Keith Cox.

Article 6

As a starting point, we would note that article 6 does not expressly prohibit extradition to face capital punishment. Nevertheless, it is appropriate to consider whether a prohibition would follow as a necessary implication of article 6.

In applying article 6, paragraph 1, of the Covenant, the Committee must, pursuant to article 31 of the Vienna Convention on the Law of Treaties, interpret this provision *in good faith* in accordance with the ordinary meaning to be given to the terms in their context. As to the ordinary meaning of the words, a prohibition of extradition is not apparent. As to the context of the provision, we believe that article 6, paragraph 1, must be read in conjunction with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes; part of the context to be considered is also the fact that a large majority of States – at the time of the drafting of the Covenant and still today – retain the death penalty. One may not like this objective context, it must not be disregarded.

Moreover, the notion *in good faith* entails that the intention of the parties to a treaty should be ascertained and carried out. There is a general principle of international law according to which no State can be bound without its consent. States parties to the Covenant gave consent to certain specific obligations under article 6 of the Covenant. The fact that this provision does not address the link between the protection of the right to life and the established practice of States in the field of extradition is not without significance.

Had the drafters of article 6 intended to preclude all extradition to face the death penalty, they could have done so. Considering that article 6 consists of six paragraphs, it is unlikely that such an important matter would have been left for future interpretation. Nevertheless, an issue under article 6 could still arise if extradition were granted for the imposition of the death penalty in breach of article 6, paragraphs 2 and 5. While this has been recognized by the Committee in its jurisprudence (see the Committee's Views in communication No. 469/1991 (Ng v. Canada) and No. 470/1990 (Kindler v. Canada)), the yardstick with which a possible breach of article 6, paragraphs 2 and 5, has to be measured, remains a restrictive one. Thus, the extraditing State may be deemed to be in violation of the Covenant only if the necessary and foreseeable consequence of its decision to extradite is that the Covenant rights of the extradited person will be violated in another jurisdiction.

In this context, reference may be made to the Second Optional Protocol, which similarly does not address the issue of extradition. This fact is significant and lends further support to the proposition that under international law extradition to face the death penalty is not prohibited under all circumstances. Otherwise the drafters of this new instrument would surely have included a provision reflecting this understanding.

An obligation not to extradite, as a matter of principle, without seeking assurances is a substantial obligation that entails considerable consequences, both domestically and internationally. Such consequences cannot be presumed without some indication that the parties intended them. If the Covenant does not expressly impose these obligations, States cannot be deemed to have assumed them. Here reference should be made to the jurisprudence of the International Court of Justice according to which interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain[35].

Admittedly, since the primary beneficiaries of human rights treaties are not States or governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties, where, as a general rule, the "meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[36] Nonetheless, when giving a broad interpretation to any human rights treaty, care must be taken not to frustrate or circumvent the ascertainable will of the drafters. Here the rules of interpretation set forth in article 32 of the Vienna Convention on the Law of Treaties help us by allowing the use of the *travaux préparatoires*. Indeed, a study of the drafting history of the Covenant reveals that when the drafters discussed the issue of extradition, they decided not to include any specific provision in the Covenant, so as to avoid conflict or undue delay in the performance of existing extradition treaties (E/CN.4/SR.154, paras. 26-57).

It has been suggested that extraditing a person to face the possible imposition of the death sentence is tantamount, for a State that has abolished capital punishment, to reintroducing it. While article 6 of the Covenant is silent on the issue of reintroduction of capital punishment, it is worth recalling, by way of comparison, that an express prohibition of reintroduction of the death penalty is provided for in article 4(3) of the American Convention on Human Rights, and that Protocol 6 to the European Convention does not allow for derogation. A commitment not to reintroduce the death penalty is a laudable one, and surely in the spirit of article 6, paragraph 6, of the Covenant. But certainly this is a matter for States parties to consider before they assume a binding obligation. Such obligation may be read into the Second Optional Protocol, which is not subject to derogation. But, as of November 1994, only 22 countries have become parties – Canada has not signed or ratified it. Regardless, granting a request to extradite a foreign national to face capital punishment in another jurisdiction cannot be equated to the reintroduction of the death penalty.

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[35] Oppenheim, International Law, 1992 edition, Vol. 1, p. 1271.

[36] This corresponds to the principle of interpretation known as in dubio mitius. Ibid., p. 1278.

Moreover, we recall that Canada is not itself imposing the death penalty, but merely observing an obligation under international law pursuant to a valid extradition treaty. Failure to fulfil a treaty obligation engages State responsibility for an internationally wrongful act, giving rise to consequences in international law for the State in breach of its obligation. By extraditing Mr. Cox, with or without assurances, Canada is merely complying with its obligation pursuant to the Canada-U.S. Extradition Treaty of 1976, which is, we would note, compatible with the United Nations Model Extradition Treaty.

Finally, it has been suggested that Canada may have restricted or derogated from article 6 in contravention of article 5 (2) of the Covenant (the "savings clause", see Manfred Nowak's CCPR Commentary, 1993, pp. 100 et seq.). This is not so, because the rights of persons under Canadian jurisdiction facing extradition to the United States were not necessarily broader under any norm of Canadian law than in the Covenant and had not been finally determined until the Supreme Court of Canada issued its 1991 judgments in the Kindler and Ng cases. Moreover, this determination was not predicated on the Covenant, but rather on the Canadian Charter of Rights and Freedoms.

Article 7

The Committee has pronounced itself in numerous cases on the issue of the "death row phenomenon" and has held that "prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons."[37] We concur with the Committee's reaffirmation and elaboration of this holding in the instant decision. Furthermore we consider that prolonged imprisonment under sentence of death could raise an issue under article 7 of the Covenant if the prolongation were unreasonable and attributable primarily to the State, as when the State is responsible for delays in the handling of the appeals or fails to issue necessary documents or written judgments. However, in the specific circumstances of the Cox case, we agree that the author has not shown that, if he were sentenced to death, his detention on death row would be unreasonably prolonged for reasons imputable to the State.

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[37] Views on communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica) adopted on 6 April 1989, paragraph 13.6. This holding has been reaffirmed in some ten subsequent cases, including Nos. 270/1988 and 271/1988 (Randolph Barrett & Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, paragraph 8.4, and No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993, paragraph 15.2.

We further believe that imposing rigid time limits for the conclusion of all appeals and requests for clemency is dangerous and may actually work against the person on death row by accelerating the execution of the sentence of death. It is generally in the interest of the petitioner to remain alive for as long as possible. Indeed, while avenues of appeal remain open, there is hope, and most petitioners will avail themselves of these possibilities, even if doing so entails continued uncertainty. This is a dilemma inherent in the administration of justice within all those societies that have not yet abolished capital punishment.

Kurt Herndl
Waleed Sadi

[Original: English]

2. Individual opinion by Mr. Tamar Ban (partly concurring, partly dissenting)

I share the Committee's conclusion that the extradition of Mr. Cox by Canada to the United States to face the possible imposition of the death penalty, under the specific circumstances of this case, would not constitute a violation of article 6 of the Covenant, and that judicial execution by lethal injection would not per se constitute a violation of article 7.

I cannot accept the Committee's position, however, that the prospects for Mr. Cox being held for a long period of time on death row, if sentenced to death, would not amount to a violation of his rights under article 7 of the Covenant.

The Committee based its finding of non violation of article 7, regarding the "death row phenomenon" on the following arguments: (1) prison conditions in the state of Pennsylvania have been considerably improved in recent times; (2) Mr. Cox has not yet been convicted nor sentenced, the trial of his two accomplices did not end with sentence of death; (3) no evidence has been adduced to show that all possibilities for appeal would not be available within a reasonable time, or that there would be unreasonable delays which would be imputable to the state (supra, paragraphs 17.1 and 17.2).

Concerning the prison conditions in Pennsylvania, the State party, Canada, has in fact shown that substantial improvements in the condition of incarceration of inmates under death sentence have taken place in that state (paragraph 13.6). The measures taken are said to consist mainly of the improvement of the physical conditions of the inmates.

Although I accept the notion that physical conditions play an important role when assessing the overall situation of prison inmates on death row, my conviction is that the decisive factor is rather psychological than physical; a long period spent in awaiting execution or the granting of pardon or clemency necessarily entails a permanent stress, an ever increasing fear which gradually fills the mind of the sentenced individual, and which, by the very nature of this situation, amounts - depending on the length of time spent on death row - to cruel, inhuman and degrading treatment, in spite of every measure taken to improve the physical conditions of the confinement.

Turning now to the second argument, that Mr. Cox has not yet been convicted nor sentenced, and that he therefore has no claim under article 7 (since only de facto sentenced-to-death convicts are in a situation to assert a violation of their rights not to be exposed to torture, cruel, inhuman or degrading treatment), I believe this argument is irrelevant when looking into the merits of the case. It could have been raised, and indeed, the State party did raise it during the admissibility procedure, but it was not honoured by the Committee. I would like to note that the Committee has taken a clear stand in its earlier jurisprudence on the responsibility of States parties for their otherwise lawful decisions to send an individual within their jurisdiction into another jurisdiction, where that person's rights would be violated as a necessary and foreseeable consequence of the decision (e.g. Committee's Views in the Kindler case, paragraph 6.2). I will try to show below, discussing the third argument, that in the present case the violation of Mr. Cox's rights following his extradition is necessary and foreseeable.

Concerning the third argument, the Committee held that the author adduced no evidence to show that all possibilities for appeal against the death sentence would not be available in the state of Pennsylvania within a reasonable time, or that there would be unreasonable delays imputable to that state, as a result of which Mr. Cox could be exposed at length to the "death row phenomenon".

I contest this finding of the Committee. In his submission of 18 September 1994, counsel for Mr. Cox contended that "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years."

In its submission of 21 October 1994, the State party - commenting on several statements made by counsel in his above mentioned submission of 18 September - remained silent on this point. In other words, it did not challenge or contest it in any way. In my opinion this lack of response testifies that the author has adduced sufficient evidence to show that appeal procedures in the state of Pennsylvania can last such a long time, which cannot be considered as reasonable.

While fully accepting the Committee's jurisprudence to the effect that every person sentenced to death must be afforded the opportunity to pursue all possibilities of appeal in conformity with article 6, paragraph 4 - a right the exercise of which, in capital cases, necessarily entails a shorter or longer stay on death row - I believe that in such cases States parties must strike a sound balance between two requirements: on the one hand all existing remedies must be made available, but on the other hand - with due regard to article 14, paragraph 3(c) - effective measures must be taken to the effect that the final decision be made within a reasonable time to avoid the violation of the sentenced person's rights under article 7.

Bearing in mind that in the state of Pennsylvania inmates face the prospect of spending a very long time - sometimes 15 years - on death row, the violation of Mr. Cox's rights can be regarded as a foreseeable and necessary consequence of his extradition. For this reason I am of the opinion that the extradition of Mr. Cox by Canada to the United States without reasonable guarantees would amount to a violation of his rights under article 7 of the Covenant.

I would like to make it clear that my position is strongly motivated by the fact that by Mr. Cox's surrender to the United States, the Committee would lose control over an individual at present within the jurisdiction of a State party to the Optional Protocol.

Tamar Ban

[Original: English]

3. Individual opinion by Messrs. Francisco José Aguilar Urbina and Fausto Pocar (dissenting)

We cannot agree with the finding of the Committee that in the present case, there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to request assurances from the United States to the effect that the death penalty would not be imposed on Mr. Keith Cox and to refuse extradition unless clear assurances to this effect are given, must in our view receive an affirmative answer.

Regarding the death penalty, it must be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee pointed out in its General Comment 6(16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable". Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates - within certain limits and in view of future abolition - the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, a fortiori, to enlarge its scope or to introduce or reintroduce it. Accordingly, a State party that has abolished the death penalty is in our view under the legal obligation, under article 6, paragraph 1, of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State party's jurisdiction, as well as to an indirect one, as is the case when the State acts - through extradition, expulsion or compulsory return - in such a way that an individual within is territory and subject to its jurisdiction may be exposed to capital punishment in another State. We therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

Regarding the claim under article 7, we cannot agree with the Committee that there has not been a violation of the Covenant. As the Committee observed in its Views on communication No. 469/1991 (Charles Chitat Ng v. Canada), "by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant", unless the execution is permitted under article 6, paragraph 2. Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that we conclude in the present case there has been a violation of article 7 of the Covenant.

Francisco José Aguilar Urbina
Fausto Pocar

[Original: English]

4. Individual opinion by Ms. Christine Chanet (dissenting)

As in the Kindler case, when replying to the questions relating to article 6 of the Covenant, the Committee in order to conclude in favour of a non-violation by Canada of its obligations under that article, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

> It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.
>
> Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and thus rules out the application of the text to countries which have abolished the death penalty.
>
> Lastly, the text imposes a series of obligations on the States in question.

Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

> One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant - and that in an express and unambiguous way - for non-abolitionist States.
>
> The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 of that "nothing in this article shall be invoked ... to prevent the abolition of capital punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in

article 5, paragraph 2, of the Covenant that "there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the decision results from the first two. Assuming that Canada is implicitly authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada in paragraphs 14.3, 14.4 and 14.5 as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non-abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had abolished the death penalty on its territory, has by extraditing Mr. Cox to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Cox, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes a discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affecting the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

Christine Chanet

[Original: French]

5. Individual opinion by Mr. Rajsoomer Lallah (dissenting)

By declining to seek assurances that the death penalty would not be imposed on Mr. Cox or, if imposed, would not be carried out, Canada violates, in my opinion, its obligations under article 6, paragraph 1, of the Covenant, read in conjunction with articles 2, 5 and 26. The reasons which lead me to this conclusion were elaborated in my individual opinion on the Views in the case of Joseph Kindler v. Canada (Communication No. 470/1991).

I would add one further observation. The fact that Mr. Cox has not yet been tried and sentenced to death, as Mr. Kindler had been when the Committee adopted its Views on his case, makes no material difference. It suffices that the offence for which Mr. Cox faces trial in the United States carries in principle capital punishment as a sentence he faces under the law of the United States. He therefore faces a charge under which his life is in jeopardy.

Rajsoomer Lallah

[Original: English]

6. Individual opinion by Mr. Bertil Wennergren (dissenting)

I do not share the Committee's Views about a non-violation of article 6 of the Covenant, as set out in paragraph 16.2 and 16.3 of the Views. On grounds which I developed in detail in my individual opinion concerning the Committee's Views on communication 470/1991 (Joseph John Kindler v. Canada), Canada did, in my opinion, violate article 6, paragraph 1, of the Covenant; it did so when, after the decision to extradite Mr. Cox to the United States had been taken, the Minister of Justice ordered him surrendered without assurances that the death penalty would not be imposed or, if imposed, would not be carried out.

As to whether the extradition of Mr. Cox to the United States would entail a violation of article 7 of the Covenant because of the so-called "death row phenomenon" associated with the imposition of a capital sentence in the case, I wish to add the following observations to the Committee's Views in paragraphs 17.1 and 17.2. The Committee has been informed that no individual has been executed in Pennsylvania for over twenty years. According to information available to the Committee, condemned prisoners are held segregated from other prisoners. While they may enjoy some particular facilities, such as bigger cells, access to radio and television sets of their own, they are nonetheless confined to death row awaiting execution for years. And this not because they avail themselves of all types of judicial appellate remedies, but because the State party does not consider it appropriate, for the time being, to proceed with the execution. If the State party considers it necessary, for policy reasons, to have resort to the death penalty as such but not necessary and not even opportune to carry out capital sentences, a condemned person's confinement to death row should, in my opinion, last for as short a period as possible, with commutation of the death sentence to life imprisonment taking place as early as possible. A stay for a prolonged and indefinite period of time on death row, in conditions of particular isolation and under the threat of execution which might by unforeseeable changes in policy become real, is not, in my opinion, compatible with the requirements of article 7, because of the unreasonable mental stress that this implies.

Thus, the extradition of Mr.Cox might also be in violation of article 7. However, there is not enough information in this case about the current practice of the Pennsylvania criminal justice and penitentiary system to allow any conclusion along the lines indicated above. What has been developed above remains hypothetical and in the nature of principles.

Bertil Wennergren

[Original: English]

N. Communication No. 606/1994; Clement Francis v. Jamaica
(Views adopted on 25 July 1995, fifty-fourth session)

Submitted by: Clement Francis (represented by counsel)

Victim: The author

State party: Jamaica

Date of communication: 12 August 1994 (initial submission)

Date of decision on admissibility: 28 July 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 1995,

Having concluded its consideration of communication No. 606/1994 submitted to the Human Rights Committee by Mr. Clement Francis under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Clement Francis, a Jamaican citizen currently detained at the General Penitentiary in Kingston, Jamaica. He claims to be the victim of violations by Jamaica of articles 6, 7, 10, paragraph 1, and 14, paragraphs 3(c), (d) and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

2. An earlier communication submitted by the author to the Committee was declared inadmissible because of non-exhaustion of domestic remedies, since it appeared from the information before the Committee that the author had failed to petition the Judicial Committee of the Privy Council for special leave to appeal.[38] The decision provided for the possibility of review of admissibility, pursuant to rule 92, paragraph 2, of the Committee's rules of procedure. On 23 July 1992, the author's petition for special leave

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[38] Communication No. 382/1989, declared inadmissible on 28 July 1992, during the Committee's 45th session.

to appeal to the Judicial Committee of the Privy Council was dismissed. With this, it is submitted, all domestic remedies have been exhausted.

The facts as submitted:

3.1 The author was arrested and charged on 22 February 1980 for the murder of one A.A. On 26 January 1981, he was found guilty as charged and sentenced to death in the Home Circuit Court of Kingston, Jamaica.

3.2 The Jamaican Court of Appeal dismissed the author's appeal on 18 November 1981; on 17 October 1987, a note of the oral judgment was produced, but no written judgment was issued. It appears from the note delivered by a judge of the Court of Appeal that Mr. Francis' legal representatives stated before the Court that they could find no grounds to argue on his behalf, to which the Court of Appeal agreed.

3.3 A warrant for the author's execution on 23 February 1988 was signed by the Governor-General, but a stay of execution was granted. It is stated that the Governor-General ordered that Mr. Francis' petition for special leave to appeal to the Judicial Committee of the Privy Council should be lodged with the Registrar of the Privy Council not later than 30 April 1988. On 10 March 1988, the London law firm willing to represent the author for the purpose of a petition for special leave to appeal, wrote to the Jamaica Council for Human Rights requesting copies of the trial transcript and Court of Appeal judgment. On 26 April 1988, the London law firm informed the Governor-General of Jamaica, that despite numerous requests by the Jamaica Council for Human Rights to the Registrar of the Court of Appeal, they had not yet obtained the written judgment of the Court of Appeal. Finally, on 1 February 1989, the Registrar of the Court of Appeal forwarded to the Jamaica Council for Human Rights a note, dated 17 October 1987, of the oral judgment in the case. The Jamaica Council for Human Rights forwarded this note to the London law firm on 8 March 1989.

3.4 Although the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal, Lord Templeman observed the following in respect of the issue of delay:

> "In this case the petitioner was found guilty of murder and sentenced to death on 26 January 1981. The Court of Appeal of Jamaica dismissed his appeal on 18 November 1981. It is now over ten years later and there comes before the Board a petition for special leave to appeal. During the whole of that time the petitioner has been under sentence of death. The delay is horrendous and appears solely due to the fact that the machinery for the Court of Appeal's reasons being written down and supplied to the petitioner's representatives is either wholly lacking or wholly broken down.
>
> The Board is well aware [...] that the legal authorities are struggling under great difficulties for lack of resources, [...], lack of machinery, lack of everything, [...]; and that in turn the Government, which must supply these facilities in the interest of justice, is labouring under great economic difficulties.

> But nevertheless the Board consider - [...] - that there must be put in place machinery for disposing of appeals, particularly in murder cases, in the sense that the delay should not be brought about by purely mechanical failure to provide facilities for recording and distributing the reasons for the trial judge or the Court of Appeal."

3.5 In December 1992, the offence for which the author was convicted was classified as a non-capital offence under the Offences Against the Person (Amendment) Act 1992; the author was removed from death row to serve a further 10 years' imprisonment at the General Penitentiary before he becomes eligible for parole.

3.6 Counsel affirms that the author has not applied to the Supreme (Constitutional) Court for redress. He submits that a constitutional motion in the Supreme Court would inevitably fail, in light of the precedent set by the Judicial Committee of the Privy Council's decisions in DAP v. Nasralla[39] and Riley et al. v. Attorney General of Jamaica[40], where it was held that the Jamaica Constitution was intended to prevent the enactment of unjust laws and not merely the unjust treatment under the law. Since Mr. Francis alleges unfair treatment under the law, and not that post-constitutional laws are unconstitutional, the constitutional motion is not available to him. Counsel further submits that, if it is nonetheless considered that Mr. Francis has a constitutional remedy in theory, it is not available to him in practice because he has no means to retain counsel and no legal aid is made available for the purpose of a constitutional motion.

3.7 It is submitted that Mr. Francis' mental condition has deteriorated as a direct result of his stay on death row. Counsel refers to the letters Mr. Francis addressed to his London solicitors, and points out that these letters demonstrate not only a high level of cognitive impairment, but also general mental disturbance and paranoia. Furthermore, reference is made to a letter, dated 3 June 1992, from the prison chaplain, Father Massie, who states, inter alia, that: "[...] Having worked with the men on Jamaica's death row for over five years, I have a fairly good sense of how they operate, what keeps them sane, what 'breaks' some. [...] It is my opinion that Clement has over the eleven years lost more and more contact with the 'real world'. While we spoke there were moments of lucidity and calmness which would suddenly be interrupted with bursts of paranoia regarding those he could no longer trust. The conversation went back and forth this way. He remembers some things very clearly, and will be conversing naturally, when, unexplainably, his voice will rise, the eyes begin to look suspiciously around, and he will become agitated over those he feels are persecuting him. [...]. As there is no psychiatric care of any kind at the prison it is not possible to get a professional opinion. I have, however, thirty years of experience as a pastoral counsellor [...] and it is my judgment that Clement Francis is in need of psychiatric help [...]."

3.8 Counsel affirms that there has not been a medical diagnosis of insanity, and that all attempts to have Mr. Francis examined by a qualified psychiatrist have failed. He claims that this is due to the difficulty in securing the services of a psychiatrist, because of the shortage of qualified psychiatrists in Jamaica and the lack of psychiatric care within the Jamaica prison system. In respect of the State party's submission to the Human Rights Committee relating to the author's earlier communication, that Mr. Francis was examined on 6 February 1990 and was found to be sane, counsel points out that no details were given as to the nature of that examination or the qualifications of the assessor. According to counsel, the information provided by the State party is insufficient to assess the sanity of the author, and should be weighed against the comments of Father Massie and the letters of the author. In support of his arguments, counsel refers to documentation on the psychological impact of death row incarceration.

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[39] 1967, 2 ALL ER 161.

[40] 1982, 2 ALL ER 469.

3.9 Counsel concludes that the nature of the alleged violations is such to require Mr. Francis' release from prison as the only means to remedy the violations.

3.10 It is stated that the matter has not been submitted for examination under any other procedure of international investigation or settlement.

The complaint:

4.1 It is submitted that the author has been denied the right to have his conviction and sentence reviewed by a higher tribunal, in violation of article 14, paragraph 5, because of the Court of Appeal's failure to issue a written judgment. Counsel points out that the right of appeal to the Judicial Committee of the Privy Council against a decision of the Court of Appeal is guaranteed by Section 110 of the Jamaican Constitution. Mr. Francis, however, was prevented from effectively exercising this right, because, in the absence of the written judgment, he was unable to meet the requirements of the Judicial Committee's rules of procedure, i.e. to explain the grounds on which he was seeking special leave to appeal, and to include copies of the Appeal Court's judgment with his petition.[41] With reference to the jurisprudence of the Human Rights Committee[42], and of English[43], Australian[44] and US[45] courts, counsel concludes that the Jamaican Court of Appeal is under a duty to provide written reasons for its decisions and that, by failing to do so in the author's case, his right to have conviction and sentence reviewed has been rendered illusory.

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[41] Rules 3 and 4 of the Judicial Committee (General Appellate Jurisdiction) Rules Order (1982 Statutory Instrument No. 1676) provide that:

> "3(1) A petition for special leave to appeal shall a) state succinctly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise Her Majesty whether such leave ought to be granted; b) deal with the merits of the case only so far as is necessary to explain the grounds upon which special leave to appeal is sought;....
>
> "4) A petitioner for special leave to appeal shall lodge a) six copies of the petition and of the judgment from which special leave to appeal is sought".

[42] Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991, paragraph 8.4.

4.2 Counsel points out that it has been over thirteen years since the Court of Appeal orally dismissed Mr. Francis' appeal and that no written judgment has been issued to date. It is submitted that the failure of the Court of Appeal to issue a written judgment, despite repeated requests on Mr. Francis' behalf, violates his right, under article 14, paragraph 3(c), of the Covenant, to be tried without undue delay. Reference is made to the Human Rights Committee's General Comment 13[46], to its jurisprudence[47], and to Lord Templeman's observations when considering Mr. Francis' petition for special leave to appeal to the Judicial Committee of the Privy Council.

4.3 As to a violation of the author's right under article 14, paragraph 3(d), it is submitted that the legal aid attorneys assigned to Mr. Francis for the purpose of his appeal, did not consult with him, nor informed him that they intended to argue before the Court of Appeal that the appeal had no merit. Counsel explains that, had Mr. Francis known that his attorneys were not going to put forward any ground of appeal, it is likely that he would have requested a change of legal representation. With reference to the Committee's Views in communication No. 356/1989, it is submitted that the attorneys assigned for Mr. Francis' appeal did not provide effective representation in the interest of justice.[48]

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[43] See e.g. Norton Tools Co. Ltd. v. Tewson [1973] 1 WLR 45, p. 49 d.

[44] See e.g. Petit v. Dunkley [1971] 1 NSWLR 376.

[45] See e.g. Griffin v. Illinois (100 L Ed 891 [1985]), p. 899.

[46] CCPR/C/21/Rev.1, p. 14, para. 10, where the Committee held that:

> "[...] all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."

[47] e.g. communication No. 282/1988 (Leaford Smith v. Jamaica), Views adopted on 31 March 1993, during the Committee's 47th session; para. 10.5.

[48] Communication No. 356/1989 (Trevor Collins v. Jamaica), Views adopted on 25 March 1993, during the Committee's 47th session. In paragraph 8.2 the Committee held that:

> "While article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue, before the appellate instance, that the appeal has no merit".

4.4 In respect of violations of articles 7 and 10, paragraph 1, counsel points out that Mr. Francis has been held on death row from his conviction and sentence on 26 January 1981 until the commutation of his death sentence to life imprisonment in December 1992. It is submitted that the mere fact that the author will no longer be executed does not nullify the mental anguish of the twelve years spent on death row, facing the prospect of being hanged. In this context, it is stated that, after a warrant had been issued for the author's execution on 23 February 1988, he was placed, on 18 February 1988, in the death cell adjacent to the gallows where condemned men are held prior to execution. He was subjected to round the clock surveillance and was weighed in order to calculate the length of "drop" required. The author claims that he was taunted by the executioner about the impending execution and about how long it would take for him to die. Furthermore, he could hear the gallows being tested. He adds that the strain of the five days in the death cell was such that he was unable to eat and it left him in a shaken, disturbed state for a long period of time. It is submitted that an increasing number of jurisdictions now recognize that prolonged periods of detention on death row can constitute inhuman and degrading treatment.[49]

4.5 In addition to the psychological stress, it is submitted that the physical conditions of Mr. Francis' detention on death row exacerbate the violations of his rights under articles 7 and 10, paragraph 1, of the Covenant. In this context, the author states that, during the 12 years on death row, he was held in a cell measuring 10 x 10 feet, which was dirty and infested with rats and cockroaches. He was only allowed out of his cell for a few minutes each day and sometimes remained locked up for 24 hours. He claims that he was regularly beaten by warders and that he still suffers from headaches as a result of a severe wound to his head sustained by the beatings, for which he was denied medical treatment. He further complains about the excessive noise on death row, caused by the cell doors which would ring loudly when slammed shut, or when rattled by inmates trying to attract the attention of the warders.

4.6 Finally, it is submitted that the issuing of a warrant of execution of a mentally disturbed person, such as the author, (see paragraphs 3.7 - 3.8 supra) is in violation of customary international law; the fact that Mr. Francis was kept on death row facing execution until December 1992, while being mentally disturbed, is said to amount to violations of articles 6, 7 and 10, paragraph 1, of the Covenant, juncto ECOSOC Resolutions 1984/50 and 1989/64. The lack of psychiatric care in St. Catherine District Prison is said to be in violation of articles 22, paragraph 1, 24 and 25 of the Standard

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an appeal or to argue, before the appellate instance, that the appeal has no merit".

[49] Reference is made, inter alia, to the findings of the European Court of Human Rights in the Soering case (judgment of 7 July 1989, Series A, Volume 161); of the Indian Supreme Court in Rajendra Prasad v. State of Uttar Pradesh (1979 3 SCR 329); of the Zimbabwe Supreme Court in Catholic Commissioners for Peace and Justice in Zimbabwe v. Attorney-General (14 HRLJ 1993); and of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica (1993, 4 ALL ER 769).

Minimum Rules for the Treatment of Prisoners.[50]

State party's observations and counsel's comments:

5.1 By submission of 16 February 1995, the State party does not raise any objections to the admissibility of the communication and offers comments on the merits, in order to expedite the examination of the communication.

5.2 The State party concedes that the author was not provided with a written judgement from the Court of Appeal, but emphasizes that, following instructions by the then President of the Court of Appeal, reasons are now being issued in all cases within three months of the hearing.

5.3 The State party argues that the author did not suffer any miscarriage of justice because of the absence of a written judgment and consequently that there has been no violation of article 14, paragraph 5, of the Covenant. Reference is made to the judgment of the Privy Council in Pratt & Morgan v. Attorney General for Jamaica[51], where the Privy Council states that the availability of reasons is not a condition precedent for lodging an application for special leave to appeal. In this connection the State party recalls that the author's case was in fact heard by the Privy Council.

5.4 As regards the author's claim under article 14, paragraph 3(d), with regard to his appeal, the State party emphasizes that it is its duty to provide competent counsel to assist the author, but that it cannot be held responsible for the manner in which counsel conducts his case, as long as it does not obstruct counsel in the preparation and conduct of the case. To hold otherwise would mean that the State has a greater burden with respect to legal aid counsel than it does for privately retained lawyers.

5.5 The State party denies that the author's detention on death row for over twelve years constitutes a violation of articles 7 and 10. The State party rejects the view that the case of Pratt & Morgan v. the Attorney General is an authority for the proposition that once a person has spent five years on death row there has been automatically a violation of his right not to be subjected to cruel and inhuman treatment. The State party argues that each case must be examined on its own merits. It refers to the Committee's jurisprudence that "in principle, prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners."[52]

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[50] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[51] Judgement of 2 November 1993.

5.6 As regards the claim that the author is mentally ill and that his continued detention on death row constituted a violation of articles 7 and 10, the State party submits that the author was examined by a psychiatrist on 6 February 1990 and that the psychiatric report states that the author displayed no psychiatric features and no evidence of cognitive impairment. On this basis, the State party rejects the assertions about the author's mental health and notes that an allegation of this kind must be supported by medical evidence.

6.1 In his comments on the State party's submission counsel for the author agrees to the immediate examination by the Committee of the merits of the communication.

6.2 Counsel reiterates that the failure of the Court of Appeal to deliver written reasons for dismissing the appeal constitutes a violation of article 14, paragraph 5, of the Covenant. In support of his view, counsel refers to the Privy Council judgment in Pratt & Morgan v. Jamaica, where it was held that "in practice it is necessary to have the reasons of the Court of Appeal available at the hearing of the application for special leave to appeal, as without them it is not usually possible to identify the point of law or serious miscarriage of justice of which the appellant complains". Counsel concludes that without a written judgement the author could not effectively exercise his right to have his conviction and sentence reviewed by a higher tribunal according to law.

6.3 As regards the claim under article 14, paragraph 3(d), that the author was not provided with effective representation before the Court of Appeal, counsel refers to the Committee's Views in communication No. 356/1989[53], where it was held that effective representation included consulting with, and informing, the accused if counsel intends to withdraw the appeal or intends to argue that the appeal has no merit. Counsel argues that, although a State party cannot be held responsible for the shortcomings of privately retained counsel, it has the responsibility to guarantee effective representation in legal aid cases.

6.4 Counsel refers inter alia to the judgment of the Privy Council in Pratt & Morgan v. Jamaica and maintains that, as the author was kept on death row for over 12 years, he has been subjected to inhuman and degrading treatment or punishment in violation of articles 7 and 10, paragraph 1, of the Covenant. In this connection counsel emphasizes the length of the delay in the author's case and the conditions on death row in St. Catherine District Prison.

6.5 As regards the author's mental state, counsel notes that the State party has given no details as to the nature of the psychiatric examination or about the qualifications of the assessor. Counsel argues therefore that the report to which the State party refers has no more evidentiary value than the comments of the prison chaplain and the letters of the author himself. Counsel reiterates that the prison chaplain is convinced that the author is suffering from a mental illness and that the letters of the author demonstrate cognitive impairment, paranoia and general mental confusion. Counsel concludes that one psychiatric evaluation over a 12 year period on death row is insufficient to determine the author's sanity.

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[52] See Committee's Views in communications Nos. 219/1986 & 225/1987 (Pratt and Morgan v. Jamaica), Views adopted on 6 April 1989.

[53] Trevor Collins v. Jamaica, Views adopted on 25 March 1993, paragraph 8.2.

6.6 In this connection counsel also recalls the five days spent by the author in the death cell in February 1988, and submits that the State party has not provided medical evidence that the author was sane at the time the warrant for execution was issued. It is argued that articles 7 and 10, paragraph 1, of the Covenant prohibit a State party from executing the insane and that Jamaica's statutory procedure for determining insanity fails to provide adequate protection of this right. In this context, counsel states that an estimated 100 prisoners at St. Catherine District Prison are mentally ill. Counsel concludes that the issuing of a warrant for execution without a prior attempt to establish the author's mental condition constitutes in itself a violation of articles 7 and 10 of the Covenant.

Decision on admissibility and examination on the merits:

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee observes that the author had submitted an earlier communication in 1989, which the Committee declared inadmissible in 1992 on account of non-exhaustion of domestic remedies. In its decision the Committee indicated that pursuant to rule 92, paragraph 2, of the rules of procedure the communication could be considered after the author had exhausted domestic remedies.

7.4 Having determined that the author has exhausted domestic remedies for purposes of the Optional Protocol, the Committee finds that it is appropriate in this case to proceed to an examination of the merits. In this context, the Committee notes that the State party does not raise any objections to the admissibility of the communication and has forwarded its comments on the merits in order to expedite the procedure. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written explanations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee finds that this period may be shortened, in the interests of justice, if the State party so wishes. The Committee further notes that counsel for the author agrees to the examination of the communication at this stage, without the submission of additional comments.

8. Accordingly, the Committee decides that the communication is admissible and

proceeds, without further delay, to the examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.1 The Committee must determine whether the author's treatment in prison, particularly during the nearly 12 years that he spent on death row following his conviction on 26 January 1981 until the commutation of his death sentence on 29 December 1992 entailed violations of articles 7 and 10 of the Covenant. With regard to the "death row phenomenon", the Committee reaffirms its well established jurisprudence that prolonged delays in the execution of a sentence of death do not per se constitute cruel, inhuman or degrading treatment. On the other hand, each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.

9.2 In the instant case, the Committee finds that the failure of the Jamaican Court of Appeal to issue a written judgment over a period of more than 13 years, despite repeated requests on Mr. Francis' behalf, must be attributed to the State party. Whereas the psychological tension created by prolonged detention on death row may affect persons in different degrees, the evidence before the Committee in this case, including the author's confused and incoherent correspondence with the Committee, indicates that his mental health seriously deteriorated during incarceration on death row. Taking into consideration the author's description of the prison conditions, including his allegations about regular beatings inflicted upon him by warders, as well as the ridicule and strain to which he was subjected during the five days he spent in the death cell awaiting execution in February 1988, which the State party has not effectively contested, the Committee concludes that these circumstances reveal a violation of Jamaica's obligations under articles 7 and 10, paragraph 1, of the Covenant.

9.3 With regard to the author's allegations of violations of article 14 of the Covenant, the Committee finds that the inordinate delay in issuing a note of oral judgment in his case entailed of violation of article 14, paragraphs 3(c) and 5, of the Covenant, although it appears that the delay did not ultimately prejudice the author's appeal to the Judicial Committee of the Privy Council. In the light of these considerations the Committee does not deem it necessary to make findings in respect of other provisions of article 14 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, 14, paragraph 3(c), and 5, of the Covenant.

11. Pursuant to article 2, paragraph 3(a), of the Covenant, the author is entitled to an effective remedy, including appropriate medical treatment, compensation and consideration for an early release.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

ANNEX XI

Decisions of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 437/1990; B. Colamarco Patiño v. Panama (decision of 21 October 1994, fifty-second session)

Submitted by:	Renato Pereira
Alleged victim:	Benjamin Colamarco Patiño
State party:	Panama

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Renato Pereira, a Panamanian attorney born in 1936 and a resident of Paris at the time of submission of the communication. He acts on behalf of Mr. Benjamin Colamarco Patiño, a Panamanian citizen born in 1957, detained at the Modelo Prison in Panama City at the time of submission of the communication. It is submitted that Mr. Colamarco is a victim of violations by Panama of articles 9 and 15 of the International Covenant on Civil and Political Rights. Mr. Pereira encloses a power of attorney from Mr. Colamarco Patiño's wife.

The facts as submitted by the author:

2.1 Benjamin Colamarco Patiño was a commander of the Panamanian "Batallones de la Dignidad", according to Mr. Pereira an elite unit which resisted the intervention of United States forces in Panama in December 1989 ("Operation Just Cause"). His active resistance was corroborated by U.S. Colonel D.T., who was in charge of United States Air Force operations during the intervention. On 10 January 1990, Mr. Colamarco Patiño was, according to his representative, taken prisoner by the U.S. forces and interned in the "Nuevo Emperador" camp.

2.2 When, on 31 January 1990, President George Bush declared the end of hostilities with Panama, most prisoners of war were released. Mr. Colamarco Patiño, however, was transferred to the Modelo Prison in Panama, where he continued to be held. He was indicted on charges of having committed certain offences against the (territorial) integrity and internal order of the Republic of Panama.

2.3 Mr. Pereira submits that Mr. Colamarco acted legitimately vis-à-vis the United States intervention. Article 306 of the Panamanian Constitution indeed obliges all Panamanian citizens to defend the integrity of Panamanian territory and the sovereignty of the State.

2.4 As to the requirement of exhaustion of domestic remedies, Mr. Pereira states, without giving further details, that Mr. Colamarco has exhausted available domestic remedies, including a request for habeas corpus to the Supreme Court of Panama, the country's highest tribunal.

2.5 In further submissions made in the course of 1992 and 1993, Mr. Pereira observed, again without giving any further details, that the Supreme Court of Panama itself had admitted that the acts attributed to Mr. Colamarco and his co-defendants did not constitute criminal offences but that, notwithstanding, his client continued to be detained at Modelo Prison. In early 1993, he indicated that the trial of Mr. Colamarco and his co-defendants was scheduled to start on 19 May 1993 before the Circuit Court Judge No. 4 of Panama City (Juez Cuarto de lo Penal del Primero Circuito Judicial de Panamá), and that the indictment of his client had been changed to include not only offences against the internal order of the State but also crimes against humanity. He objects to the qualification of the offences imputed to Mr. Colamarco Patiño as "political crimes".

The complaint:

3. The author contends that the facts as submitted reveal violations by Panama of articles 9 and 15 of the Covenant.

The State party's information and observations:

4.1 In its submission under rule 91 of the rules of procedure, the State party observes that the trial of Mr. Colamarco and of three co-defendants started as scheduled on 19 May 1993. Mr. Colamarco was represented, both during the preliminary enquiry and during the trial, by a lawyer of his choice. On 4 June 1993, the circuit court judge found Mr. Colamarco and the other co-accused guilty of offences against the internal State order; they were sentenced to forty-four months and ten days of imprisonment and prohibited from running for public office for the same period of time, to run from the day the prison term had been purged. All of the accused were acquitted of the charge of crimes against humanity.

4.2 The Court's decision was notified to Mr. Colamarco. Although his legal representative initially appealed the sentence, he subsequently withdrew the appeal.

4.3 The State party concludes that by February 1994, the case had been filed, because the time spent in preventive detention by Mr. Colamarco had been set off against the prison term imposed on him. He has therefore been released, and no further charges against him remain pending.

Issues and proceedings before the Committee:

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As to the claim under article 9, paragraph 1, the Committee begins by noting that the author links the alleged arbitrariness of Mr. Colamarco's arrest and detention to his presumed innocence. Nothing in the file, however, reveals that Mr. Colamarco was not detained on specific charges (see paragraph 2.2 above), pending the determination of his innocence or guilt by a court of law, and that he was not properly indicted. But, in any event, the Committee notes that Mr. Colamarco's counsel, while initially appealing the judgment of 4 June 1993 against his client, later withdrew the appeal, where these issues could have been dealt with. For the purpose of article 5, paragraph 2(b), of the Optional Protocol, an applicant must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress. This Mr. Colamarco's counsel has failed to do, and available domestic remedies have accordingly not been exhausted in the case.

6. The Human Rights Committee therefore decides:

(a) the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol;

(b) that this decision shall be communicated to the State party and the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

B. Communication No. 438/1990; Enrique Thompson v. Panama (decision adopted on 21 October 1994, fifty-second session)

Submitted by: Renato Pereira

Alleged victim: Enrique Thompson

State party: Panama

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Renato Pereira, a Panamanian attorney residing in Paris at the time of submission of the communication. He acts on behalf of Mr. Enrique Thompson, a Panamanian citizen and architect by profession, who was detained at the Modelo Prison in Panama City at the time of submission of the communication. It is submitted that Mr. Thompson is a victim of violations by Panama of articles 9, paragraphs 1 and 2, and 15, paragraph 1, of the International Covenant on Civil and Political Rights. Mr. Pereira encloses a power of attorney from Mr. Thompson's wife.

The facts as submitted by the author:

2.1 Mr. Thompson was a leading member of the Panamanian "Batallones de la Dignidad", according to Mr. Pereira an elite unit which resisted the intervention of United States forces in Panama in December 1989 ("Operation Just Cause"). His active resistance was corroborated by U.S. Colonel D.T., who was in charge of United States Air Force operations during the intervention. On 10 January 1990, Mr. Thompson was, according to his representative, taken prisoner by the U.S. forces and interned in the "Nuevo Emperador" camp.

2.2 When, on 31 January 1990, President George Bush declared the end of hostilities with Panama, most prisoners of war were released. Mr. Thompson, however, was transferred to the Modelo Prison in Panama, where he continued to be held. He was indicted on charges of having committed certain offences against the (territorial) integrity and the internal order of the Republic of Panama.

2.3 The author contends that Mr. Thompson acted legitimately vis-à-vis the United States intervention. Article 306 of the Panamanian Constitution indeed obliges all Panamanian citizens to defend the integrity of Panamanian territory and the sovereignty of the State.

2.4 The author states, without giving any further details, that all available domestic remedies have been exhausted in the case of Mr. Thompson.

2.5 In further submissions made in the course of 1992 and 1993, Mr. Pereira observed, again without giving any further details, that the Supreme Court of Panama itself had admitted that the acts attributed to Mr. Thompson and his co-defendants did not constitute criminal offences but that, notwithstanding this statement, his client continued to be detained at Modelo Prison. In early 1993, he indicated that the trial of Mr. Thompson and his co-defendants was scheduled to start on 19 May 1993 before the Circuit Court Judge No.4 of Panama City (Juez Cuarto de lo Penal del Primero Circuito Judicial de Panamá), and that the indictment of Mr. Thompson had been changed to include not only offences against the internal order of the State, but also crimes against humanity. He objects to the qualification of the offences imputed to Mr. Thompson as "political offences".

The complaint:

3.1 The author submits that Mr. Thompson is a victim of violations of articles 9, paragraphs 1 and 2, and 15, paragraph 1, of the Covenant. He contends that Mr. Thompson's detention is arbitrary because he allegedly did not commit any punishable offences, and that he was not informed of the reasons for his detention nor of his indictment. Article 15 is said to have been violated because none of the acts imputed to Mr. Thompson were criminal offences at the time of their commission.

The State party's information and observations:

4.1 In its submission under rule 91 of the rules of procedure, the State party observes that the trial of Mr. Thompson and three co-defendants began as scheduled on 19 May 1993. Mr. Thompson was represented throughout the trial by a legal representative of his choice. On 4 June 1993, the Circuit Court Judge found Mr. Thompson and his co-defendants guilty of offences against the internal order of the State and sentenced them to forty-four months and ten days of imprisonment; they were further prohibited from running for public office for the same period of time, to run from the day the prison term had been purged. All of the accused were acquitted of the charge of crimes against humanity.

4.2 The court's decision was notified to Mr. Thompson and to his representative. Although his lawyer initially appealed the sentence, he subsequently withdrew the appeal.

4.3 The State party concludes that as of February 1994, the case had been filed, as the time spent in preventive detention by Mr. Thompson had been set off against the prison term imposed upon him. He has therefore been released, and no further charges against him remain pending.

Issues and proceedings before the Committee:

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As to the claims under articles 9, paragraphs 1 and 2, the Committee begins by noting that the author links the alleged arbitrariness of Mr. Thompson's arrest and detention to his presumed innocence. Nothing in the file, however, indicates that Mr. Thompson was not held on specific charges (see paragraph 2.2 above), pending the determination of his innocence or guilt by a court of law, and that he was not properly indicted. But, in any event, the Committee notes that Mr. Thompson's counsel, while initially appealing the sentence of 4 June 1993 against his client, later withdrew the appeal, where these issues could have been dealt with. For the purpose of article 5, paragraph 2(b), of the Optional Protocol, an applicant must make use of all judicial or administrative avenues that offer him a reasonable prospect of success. This Mr. Thompson's counsel has failed to do, and available domestic remedies accordingly have not been exhausted in the case.

6. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol;

(b) that this decision shall be communicated to the State party and the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

C. Communication No. 460/1991; T. Omar Simons v. Panama (decision of 25 October 1994, fifty-second session)

Submitted by: Terani Omar Simons

Alleged victim: The author

State party: Panama

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Terani Omar Simons, a Panamanian citizen currently residing in El Dorado, Panama. He claims to be a victim of violations by Panama of his human rights without, however, invoking specific provisions of the International Covenant on Civil and Political Rights.

The facts as presented by the author:

2.1 Towards the end of 1981, the author was employed by a private insurance company, the Compania Fiduciaria y de Seguros S.A.. In December 1981, he was appointed Managing Director (Gerente General) of this company and at the same time became a major shareholder. The company managed, at the time, a large percentage of the insurance contracts administered by an official social security organism, the Caja de Seguro Social.

2.2 In October 1982, the author was accused of being an accomplice to illegal financial transactions concerning the Compania Fiduciaria and to have pursued personal interests in connection with the administration of a large public housing project (Programa colectivo de viviendas de la Caja de Seguro Social) run by the Caja de Seguro.

2.3 In a financial audit (vista fiscal) of 24 January 1983, the public prosecutor charged the author with abuse of authority. On 19 May 1983, Mr. Simons was also charged with the offence of bribing officials (delito de peculato culposo), to the detriment of the Caja de Seguro Social.

2.4 On 27 September 1983, the author requested a local tribunal (Segundo Tribunal Superior de Justicia) to strike the indictments from the court agenda. On 31 January 1985, the Criminal Chamber of the Second District Court of Panama (Juzgado Segundo del Circuito, Ramo penal) found him guilty as charged on both counts and sentenced him to fifteen months' imprisonment. The author appealed to the Segundo Tribunal Superior de Justicia on 27 March 1985, but the appeal was dismissed. On an unspecified date in 1987, another court (Juzgado IIª - Ramo penal) rejected the author's request for the provisional suspension of execution of the sentence (suspención condicional de ejecución de la pena). In November 1990, the Segundo Tribunal de Justicia dismissed the author's (further) appeal and confirmed the decision of 1987. At the same time, it ordered the author's arrest ("... se dictó orden de arresto").

2.5 The author claims that the criminal proceedings against him were based on false evidence (pruebas falsas). He explains that, in May 1982, two cheques had been paid to the benefit of two former directors of the Caja de Seguro Social. The prosecution contended that these two cheques were paid by the insurance company managed by the author; the author however maintains that he never signed cheques during the time in question and contends that the cheques were signed by shareholders of two construction companies, Alveyco S. A. and Urbana de Expansión S.A., with whom he maintained no contacts. He therefore claims that he is a victim of a judicial error amounting to a denial of justice. The author further contends, without giving details, that as a result of the criminal proceedings, he suffered unlawful attacks on his honour and professional reputation, as well as substantial financial damages.

The complaint:

3. It transpires from the facts as described above that the author claims to be a victim of a violation of articles 14 and 17 of the Covenant.

Issues and proceedings before the Committee:

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 On 28 December 1992, the communication was transmitted to the State party under rule 91 of the rules of procedure, requesting it to provide information and observations on the question of admissibility. No information was received from the State party within the imparted deadline. On 29 July 1994, the State party was advised that any information or observations should reach the Committee well in advance of the Committee's 52nd session; no submission has been received. The Committee expresses its regret at the State party's failure to cooperate and reaffirms that it is implicit in the Optional Protocol that a State party provide the Committee in good faith with all the information at its disposal. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated, for purposes of admissibility.

4.3 Concerning the author's contention that he was a victim of a denial of justice, the Committee notes that his complaint relates primarily to the evaluation of the evidence in the case by the Panamanian tribunals. It recalls that it is in principle for the domestic courts of States parties to the Covenant to review the evidence in any particular case and for the appellate courts to review the evaluation of the evidence by the lower courts. It is not for the Committee to evaluate the evidence in a case, unless it can be ascertained that the court's decision was arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of independence and impartiality. After reviewing the material before it, the Committee cannot conclude that the proceedings against Mr. Simons suffered from such defects. Therefore, this claim is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

4.4 As to the claim under article 17, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the judicial proceedings against him and his conviction constituted an arbitrary or unlawful attack on his honour and reputation. In this respect, accordingly, the author has no claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) that this decision be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

D. Communication No. 494/1992; Lloyd Rogers v. Jamaica (decision of 4 April 1995, fifty-third session)

Submitted by:	Lloyd Rogers [represented by counsel]
Alleged victim:	The author
State party:	Jamaica

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Lloyd Rogers, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 6, paragraphs 2, 7 and 10, and article 14, paragraphs 1, 3 and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 21 March 1984, the author was tried and convicted in the Home Circuit Court of Kingston for the murder, on 5 July 1980, of one Marjorie Thomas. In July 1983, he had been tried for the same offence, but the jury did not return a unanimous verdict and a retrial was ordered. After his conviction, the author applied for leave to appeal to the Jamaican Court of Appeal, which confirmed the sentence on 18 December 1985.

2.2 The author had been a corporal in the police force and was a friend of the victim. On 5 July 1980, he had gone with Ms. Thomas and two other acquaintances to a beach in Kingston. While bathing, Ms. Thomas drowned. The author reported the matter to the police station. Ms. Thomas' body was recovered the next day. A post-mortem examination revealed that she had died from asphyxia, caused by strangulation. In the pathologist's opinion, a lesion over the right side of the neck could have been caused by any object with a rough surface, like a rope, belt or stick.

2.3 On 9 July 1980, after having read the post-mortem report, Detective Corporal Thomas interviewed the author, who was cautioned and made a deposition. In it, he stated that on the beach, the deceased had gone for a swim; when she suddenly plunged under water, resurfaced and called for help, the author went out to her and tried to drag her out of the water with his hands. Because he could not swim, he let go and called for help himself. A "rastaman" came to his assistance, but by the time he had reached the spot, the victim had disappeared.

2.4 The prosecution's case rested mainly on the author's statement of 9 July 1980. During the trial, the author made a statement from the dock, in which he stated that the victim had been his girlfriend and that he had tried to save her with a stick with a hook at the end; he had placed the stick around her neck but although she had grasped it with both hands, the current made it difficult to get her out. Thereafter the "rastaman" went to her rescue, in vain. No witnesses were called in the author's defence.

2.5 Before the Court of Appeal, the author's counsel did not challenge the factual basis of the case nor the directions to the jury given by the trial judge. She applied for the introduction of fresh evidence on the basis that one of the jurors had in fact disagreed with the "guilty" verdict but never openly voiced that disagreement in court. The Court of Appeal considered that, if in fact the juror had shaken her head to indicate dissent, then that apparently was not noticed by the prosecution or the defence during the trial, nor by the judge, the court registrar or the court reporter. The Court of Appeal therefore saw no reason to allow the appeal, and considered the directions of the trial judge to have been fair and thorough.

2.6 After the dismissal of his appeal, the author sought to petition the Judicial Committee of the Privy Council for special leave to appeal. On 24 May 1990, leading counsel advised that, on the basis of the Judicial Committee's jurisprudence, such a petition would fail; he referred in particular to the Judicial Committee's decision on the case of R. v. Lalchan Nanan, in which the Privy Council had refused to entertain a request to overturn a capital verdict which, in spite of the appearance of unanimity, had allegedly been split and not unanimous. Counsel considers that, in the light of this precedent, a petition for special leave to appeal would not constitute an effective remedy within the meaning of the Optional Protocol.

Complaint

3.1 Counsel alleges violations of articles 7 and 10, on account of "inhuman and degrading treatment" of the author in custody on death row.

3.2 Counsel further argues that the author's conviction on the basis of a not unanimous verdict by the jury amounts to a violation of article 14, paragraph 1, of the Covenant.

3.3 Counsel also argues that the author's privately retained counsel did not represent him properly. In this connection, it is stated that counsel was absent from the preliminary hearing, did not call any witnesses for the defence, failed to challenge the evidence put forward by the prosecution and did not argue the appeal properly.

3.4 Counsel also contends that potential defence witnesses were intimidated by the police, without however giving any details of this intimidation.

State party's observations

4. By a submission of 9 September 1992, the State party argues that the communication is inadmissible, because it does not disclose any violation of the Covenant.

5. In reply to the State party's submission, counsel indicates that he has nothing to add to his initial communication.

Issues and proceedings before the Committee

6.1 Before considering any claim in a communication, the Human Rights Committee, in accordance with rule 87 of its rules of procedure, must decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee refers to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant. 1/ The Committee observes that the author has not shown in what particular ways he was so treated as to raise an issue under articles 7 and 10 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.3 The Committee further considers that counsel has failed to substantiate, for purposes of admissibility, his claim that the author's defence lawyer did not properly represent him and that the jury's verdict was not unanimous, amounting to a violation of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee decides:

(a) The communication is inadmissible;

(b) The present decision shall be communicated to the State party and to the author's counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be also issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1/ See the Committee's views on communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, para. 13.6. See also, inter alia, the Committee's views on communications Nos. 270/1988 and 271/1988 (Randolph Barret and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, and No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993.

E. Communication No. 515/1992; Peter Holder v. Trinidad and Tobago (decision adopted on 19 July 1995, fifty-fourth session)

Submitted by: Peter Holder (represented by counsel)

Alleged victim: The author

State party: Trinidad and Tobago

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Peter Holder[54], a Trinidadian citizen, at the time of submission awaiting execution at the State Prison of Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations of his human rights by Trinidad and Tobago. The author's death sentence has been commuted to life imprisonment.

2.1 The author and two men, Irvin Phillip and Errol Janet, were jointly charged with the murder on 29 March 1985, of one Faith Phillip. On 5 May 1988, after a trial which lasted one month, the jury failed to return a unanimous verdict, and a retrial was ordered. On 18 June 1988, the accused were found guilty as charged and sentenced to death by the second Assizes Court of Port-of-Spain. In March 1990, the Court of Appeal of Trinidad and Tobago dismissed the appeal of Messrs. Holder and Phillip, whereas it acquitted Errol Janet; it issued a written judgment two weeks later. On 27 June 1994, Mr. Holder petitioned the Privy Council for special leave to appeal which has been granted, however the case still has not been heard by the Privy Council.

2.2 The case for the prosecution was based on the evidence given by the sole eyewitness to the crime who testified that, on the morning of 29 March 1985, she was at work in the Zodiac Recreation Club in Port-of-Spain. She was inside the bar and Faith Phillip sat in front of the bar, when the three men came in. They sat down at a table and started talking. Accused No.1, whom she recognised as Mr. Holder, ordered a drink. After a while, he went downstairs and she heard a sound as if the gate to the entrance was being closed. When he came back, she asked the deceased to have a look. Upon her return to the bar, the deceased was grabbed by accused No.2, whom she recognised as Mr. Phillip. Accused No.1 then kicked open the door to the bar and entered the bar with accused No.3, whom she recognised as Mr. Janet. Both were holding knives. accused No.1 forced her to open the cash register, which she did, and accused No.3 took the money from it. She was forced to show them the Club owner's room, which was at the back. There, accused No.1 tied her up, while No.3 searched the room for valuables. She was told to face the wall, but before doing so she saw accused No.2 pulling Ms Phillip to the back. She then heard fighting in the opposite room, which continued for about 5 minutes. After it stopped she heard footsteps, as if the accused were leaving. Finally, she was untied by the Club's electrician who passed by and they found the deceased lying on the floor.

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[54] Original communication was submitted by Peter Holder and Irvin Phillip, the communications were separated at counsel's request and have been respectively registered as communications Nos. 515/1992 and 594/1992.

2.3 One of the co-accused, Mr. Phillip, gave sworn testimony denying any knowledge of the crime and claiming that he had never left his home on 29 March 1985. His statement to the police was also admitted into evidence after a voire dire.

2.4 The second co-accused, Mr. Janet, affirmed upon oath his previous statement to the police. He stated that the robbery had been planned by accused No.1 and 2, who had received information that the owner of the Club kept all his money at the Club. He claims to have taken part in the robbery out of fear of the other two men. He further stated that he had prevented accused No.1 from further hitting the deceased.

2.5 The case for the defence was based on the sworn statement given by Mr. Holder at the trial, in which he admitted his participation in the robbery. He denied, however, having struck the deceased. He stated that while he and accused No. 3 were emptying the drawers in the Club owner's room, he saw accused No.2 going up the corridor with the deceased. When they left the building, they met accused No. 2 outside. The author further denied that he made selfincriminating statements to the police. Said statements were admitted into evidence after counsel had challenged their voluntariness.

2.6 The author states that, in the morning of 3 April 1985, he went to the police station, because he had heard that the police was looking for him.

The complaint

3.1 The author claims that his trial was unfair in breach of article 14 of the Covenant. In this context, he submits that :

- during the first trial, an article was published in the local newspaper which was highly prejudicial to his case. He states that the judge, as well as the three counsels for the defence, called upon the reporters to rectify the "misleading" publication. However, the effect was such that it would have been impossible to select an unbiased jury for the re-trial.

- the initial date for the re-trial was 1 June 1988. On that day, he was informed that his counsel and counsel for Mr. Phillip had withdrawn from the case. In spite of their requests for a counsel of their own choosing, the judge told them that he would appoint counsel and adjourned the trial to 16 June 1988. On 6 June 1988, the author wrote a letter to the Legal Aid Authorities, requesting counsel of his own choice. He states that one day before the trial started, he was visited by another court-appointed lawyer, who only took thirty minutes to discuss his case. The author alleges that the assignment of a lawyer contrary to his choice amounts to a violation of Section 4, paragraphs (b) and (d), and section 5, paragraph 2 (c), of the Constitution of Trinidad and Tobago. He also claims that he was denied reasonable time for the preparation of his defence.

- the trial judge prevented counsel from properly conducting the defence. The author claims that the judge constantly interrupted and embarrassed counsel by telling him questions to ask and refusing to admit others. Before the trial started the judge allegedly set a deadline, thereby putting a lot of pressure on counsel to complete the defence within a specified time limit. When counsel asked for a break, the judge allegedly prevented counsel from seeking the author's instructions during the trial. The judge also allegedly forced the author to reply to self-incriminating questions in cross-examination by the prosecution, by threatening him that he would be charged with contempt of court if he did not reply.

- counsel failed to adequately represent the author. The author complains that his counsel was inexperienced and that he failed to cross-examine witnesses on relevant issues. This is said to amount to gross negligence.

- the police failed to adequately inform the author of the charges against him. The author claims that he was only charged with robbery, whereas he was later convicted of murder.

3.2 The author further claims that when he was taken into custody he was placed in a cell which allegedly was so crowded that he had to remain standing up all day and night. He claims that he was denied the use of a toilet, as well as food and water. Furthermore, he claims that the following morning he was taken to an office where he was "physically assaulted" by police officers, in breach of article 10 of the Covenant.

3.3 It is not stated whether the case has been submitted to another procedure of international investigation or settlement.

The State party's information and observations

4. By submission of 12 November 1993, the State party states that the author's case is before the Privy Council. In a further submission of 9 February 1994, the State Party informs the Committee that the author's death sentence has been commuted to life imprisonment.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 As to the requirement in article 5, paragraph 2(b), of the Optional Protocol that domestic remedies be exhausted, the Committee notes that the State party and the author agree that the author's case is still pending before the Judicial Committee of the Privy Council. Therefore, the Committee concludes that domestic remedies have not been exhausted.

6. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) that this decision shall be communicated to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

F. Communication No. 525/1992; Pierre Gire v. France (decision adopted on 28 March 1995, fifty-third session)

Submitted by: Pierre Gire

Alleged victim: The author

State party: France

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Pierre Gire, a French citizen, at the time of submission of the communication detained in the Maison d'arrêt at Nantes, France. He claims to be a victim of a violation of his human rights by France, without invoking specific articles of the Covenant.

Facts as submitted by the author

2.1 The author was the director of the Atlantic Festival, a music festival at Nantes. On 9 March 1991, he was arrested and, on 11 March 1991, charged with fraud and forgery. The charges relate to an unaccounted amount of 14 million French francs in the organization of the Festival. The author claims that he is innocent and that the money was paid out to artists upon instructions from the board of the Association Festival Atlantique. He further claims that the responsible politicians in Nantes were well aware of the financial problems of the Festival, but continued to encourage its funding.

2.2 The author states that he was kept in pre-trial detention for 22 months and 22 days, from 9 March 1991 to 28 January 1993, and that he filed numerous unsuccessful requests for his release.

Complaint

3.1 The author contends that the preliminary investigations were unduly prolonged and that his right to trial within a reasonable time has been violated. In this connection, he claims that some of the witnesses, all members of the Association, were heard only 16 months after his arrest.

3.2 The author further claims that the investigation has not been impartial and that he is being used as a scapegoat to avoid disclosures about the involvement of politicians in the matter. In this connection, he submits that a press conference was organized by the Prosecutor's Office on 11 March 1991, which depicted him as being solely responsible; he alleges that this press conference prejudiced witnesses against him.

3.3 Finally, the author alleges that he was not able to prepare his defence properly in the circumstances of his detention.

The State party's observations

4.1 The State party, by submission of 6 June 1994, explains that the author was arrested after the president of the Conseil Général de Loire-Atlantique and the director general of the departmental administrative authority had brought to the attention of the prosecutor a number of documents with their falsified signatures. The State party submits that in the course of the investigations evidence was found of at least 70 instances of fraud and forgery.

4.2 The State party argues that the communication is inadmissible. It submits that the author submitted a complaint under the European Convention for the Protection of Human Rights and Fundamental Freedoms to the European Commission of Human Rights, which, on 14 October 1993, declared the case inadmissible for failure to exhaust domestic remedies. The State party recalls that it entered a reservation, upon ratifying the Optional Protocol, with regard to article 5, paragraph 2 (a), to the effect that the Human Rights Committee is not competent to examine a communication if the same matter has already been considered by another procedure of international investigation or settlement.

4.3 Moreover, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this connection, it submits that it was open to the author to appeal the decisions of the Court of Appeal not to order his release, to the Court of Cassation, pursuant to articles 567 and 567-2 of the Code of Penal Procedure, but that he failed to make use of this remedy. The State party argues that the cassation appeal constitutes an effective remedy, since the Court of Cassation, when seized of a matter of pre-trial detention, reviews the question whether the Court of Appeal has correctly applied the requirements to justify the continuation of the pre-trial detention and whether the rules of fair procedure have been respected. The State party submits therefore that the communication does not fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

4.4 As regards the author's remaining complaints about the partiality of the investigations against him, the State party emphasizes that the criminal procedures against the author are still pending and that his guilt has not yet been determined by a tribunal. The State party argues that this complaint is therefore inadmissible for failure to exhaust domestic remedies.

5. No comments on the State party's submission were received from the author of the communication, despite a reminder sent on 22 December 1994.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has further argued that the communication is inadmissible for failure to exhaust domestic remedies. The Committee notes that the author has not contested that he could have appealed the decisions of the Court of Appeal, refusing his release from pre-trial detention, to the Court of Cassation and has not explained why he failed to make use of this remedy. Furthermore, as regards the author's complaints that the proceedings against him are biased and that he was not able to prepare his defence properly, the Committee notes that the author's trial is currently in process and that domestic remedies are thus not yet exhausted. The communication, therefore, does not fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) This decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

G. Communication No. 536/1993; Francis P. Perera v. Australia (decision adopted on 28 March 1995, fifty-third session)

Submitted by:	Francis Peter Perera
Alleged victim:	The author
State party:	Australia

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Francis Peter Perera, a merchant seaman and Australian citizen by naturalization, born in Sri Lanka and currently living at Kangaroo Point, Queensland, Australia. He claims to be the victim of a violation by Australia of articles 14, paragraphs 1, 3(e) and 5, and 26 of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author was arrested on 11 July 1984, together with one Fred Jensen. He was charged with drug-related offences and later released on bail. On 17 May 1985, he was found guilty on two charges of supplying heroin and one charge of possession of a sum of money obtained by way of commission of a drug offence. He was sentenced to nine years' imprisonment by the Supreme Court of Queensland. On 21 August 1985, the Court of Criminal Appeal quashed the judgement and ordered a retrial. Upon conclusion of the retrial the author, on 3 March 1986, was found guilty of having possessed and having sold more than 9 grams of heroin to Jensen on 11 July 1984; he was sentenced to eight years' imprisonment. He appealed the judgement on the grounds of misdirection by the judge to the jury, and bias by the judge in the summing-up. The Court of Criminal Appeal dismissed his appeal on 17 June 1986. On 8 May 1987, the High Court of Australia refused the author leave to appeal. On 18 November 1989, the author was released from prison to "home detention" for health reasons; since 17 March 1990 he has been on parole. His parole ended on 18 March 1994.

2.2 At the trial, the prosecution submitted that, early in the morning of 11 July 1984, the author had driven with Jensen in the latter's car; the car had parked next to another car; the author stayed in the car while Jensen went to the other car to sell $11,000 worth of heroin to an undercover police officer. While the sale was proceeding, police arrived and arrested both the author and Jensen. According to the prosecution, the author, when arrested by the police, immediately voluntarily admitted having handed over heroin to Jensen to sell. The author's house was searched by the police and an amount of money was seized; no drugs were found. The prosecution claimed that $3,000 found in the house was marked money used for the buying of heroin from Jensen on 1 July 1984.

2.3 On 15 October 1985, in a separate trial, Jensen was found guilty of four charges of supplying a dangerous drug, two charges of selling a dangerous drug, and one charge of being in possession of money from the sale of a dangerous drug. On each charge, he was sentenced to six years' imprisonment, to run concurrently.

2.4 The author claims to know nothing of the offence he was charged with and stresses that no drugs were found in his possession. He submits that he did not know about Jensen's involvement with drugs. During the trial, he gave sworn evidence to the effect that Jensen used to work as a handyman around his house, and that, on the morning of 11 July 1984, they were travelling in Jensen's car to a piece of land to build a shack for the author. He further stated that he and his wife, at the end of 1983, had given Jensen $4,000 to fix things in the house. They then left for Sri Lanka in November 1983 and returned in February 1984, only to discover that Jensen had not done the work for which he was commissioned. In July 1984, Jensen then paid them back $3,000.

2.5 The author states that the only non-circumstantial evidence against him, on the basis of which he was sentenced, was the evidence given by two policemen that he made admissions regarding his involvement in the sale of heroin on 11 July 1984, first at the roadside, immediately upon his arrest, and later the same morning in the police station. One of the policemen made notes, reflecting the admissions, in his notebook; these notes were not signed by the author.

Complaint

3.1 The author alleges that he did not have a fair trial. He claims that he never made a statement to the police and that the notes which were admitted as evidence during the trial were a fraud. He also claims that the police threatened and hit him and that he was in considerable distress during the interrogations. The author submits that these issues were raised at the trial, but that the judge, after a voir dire, admitted the policemen's evidence regarding the statement given by the author.

3.2 The author further claims that, during the trial, he had repeatedly asked his lawyer to call Jensen as a witness, but that he was advised that there was no need for the defence to call him; nor did the prosecution call Jensen as a witness. The author submits that his lawyer did not raise as a ground of appeal the failure to call Jensen as a witness, although the fact that he was not heard allegedly gave rise to a miscarriage of justice. The author claims that the failure to call Jensen as a witness, despite his numerous requests, constitutes a violation of article 14, paragraph 3(e), of the Covenant. In this context, the author also claims that he later discovered that his privately retained lawyer had been in possession of a statement, made by Jensen on 1 March 1986, which exculpated the author. However, this statement was not brought to the attention of the Court. In the statement Jensen admits having difficulty remembering the events of two years previously, as a result of his then drug addiction; he states, however, that at the time he was doing some work for the author around the house and that the author was not aware that he was selling heroin.

3.3 The author further claims that his right to have his conviction and sentence reviewed by a higher tribunal according to law has been violated, since an appeal under Queensland law can be argued only on points of law and allows no rehearing of facts. This is said to constitute a violation of article 14, paragraph 5.

3.4 The author further claims that he was discriminated against by the police because of his racial and national origin. He claims that he was called racist names by the police officers who arrested him and that their decision to fabricate evidence against him was motivated by reasons of racial discrimination.

State party's observations and the author's comments thereon

4.1 The State party, by submission of December 1993, argues that the communication is inadmissible.

4.2 As regards the author's general claim that he did not have a fair trial, the State party argues that this claim has not been sufficiently substantiated. In this connection, the State party contends that the claim lacks precision. The State party points out that the independence of the judiciary and the conditions for a fair trial are guaranteed by the constitution of Queensland and satisfy the criteria set out in article 14 of the Covenant. The State party recalls that the author's first conviction was quashed by the Court of Criminal Appeal, because the Court considered that the judge's instructions to the jury had been unbalanced. The State party argues that the author's retrial was fair and that it is not the Human Rights Committee's function to provide a judicial appeal from or review of decisions of national authorities.

4.3 As regards the author's claim that his right under article 14, paragraph 3(e), was violated because his lawyer failed to call Jensen as a witness, the State party argues that the author was at no stage hindered by the State party in obtaining the attendance of the witness, but that it was his counsel's decision not to do so. In this context, the State party submits that the police had a signed interview with Mr. Jensen in which he stated that he paid the author in exchange for drugs. Furthermore, the State party submits that the matter was never raised on appeal, and that therefore domestic remedies have not been exhausted. The State party adds that it is not the Government's responsibility to organize the defence of a person accused of having committed a crime.

4.4 As regards the author's claim that his right to review of conviction and sentence was violated, the State party argues that he has failed to substantiate this claim and that, moreover, his claim is incompatible with the provision of article 14, paragraph 5. The State party explains that the primary ground upon which a conviction may be set aside under the Queensland Criminal Code is "miscarriage of justice". It is stated that arbitrary or unfair instructions to the jury and partiality on the part of the trial judge would give rise to a miscarriage of justice. In this context, reference is made to the author's appeal against his first conviction, which was quashed by the Court. The author's appeal against his second conviction, after the retrial, was dismissed. The State party argues that the appellate courts in the author's case did evaluate the facts and evidence placed before the trial courts and reviewed the interpretation of domestic law by those courts, in compliance with article 14, paragraph 5. Finally, the State party refers to the Committee's jurisprudence that "it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before the courts and to review the interpretation of domestic law by those courts. Similarly, it is for appellate courts and not for the Committee to review specific instructions to the jury by the trial judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality."[55] The State party submits that the Australian appeal processes comply with the interpretation of article 14, paragraph 5, as expressed by the Committee.

4.5 The State party argues that the author's claim that he was subjected to racial discrimination and beatings by members of the Queensland Police Force is inadmissible. In this context, the State party also notes that the incidents complained of occurred in July 1984. The State party submits that there is no evidence that the police actually engaged in racist behaviour. At the trial, the police denied all allegations to that effect. As regards the author's claim that the police fabricated the evidence against him, the State party notes that this allegation was brought before the courts and that it was rejected; there is no suggestion that this rejection was based on racial discrimination. The State party concludes therefore that the claim that the evidence against the author was fabricated for reasons of racial discrimination is unsubstantiated. The author's complaints about police violence and racist abuse were brought to the attention of the Criminal Justice Commission in 1989, which, on 15 March 1991, decided not to conduct any further investigation. The State party argues, however, that another remedy was available to the author under the federal Racial Discrimination Act 1975. Under the Act, complaints can be made to the Human Rights and Equal Opportunity Commission within 12 months of the alleged unlawful conduct. Since the author failed to avail himself of this remedy, the State party argues that his claim under article 26 is inadmissible for failure to exhaust domestic remedies.

5.1 In his comments on the State party's submission, the author reiterates that he had made explicit requests to his solicitors to have Jensen called as a witness, but that they failed to call him, informing him that Jensen's evidence was not relevant to the defence and that it was up to the prosecution to call him. The author states that, being an immigrant and lacking knowledge of the law, he depended on his lawyer's advice, which proved to be detrimental to his defence. In this context, he submits that, under Australian law, he can enforce his right to call witnesses only through his solicitor, not independently. According to the author, his solicitor was accredited to the Supreme

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[55] Communication No. 331/1988, para. 5.2 (G.J. v. Trinidad and Tobago, declared inadmissible on 5 November 1991).

Court of Queensland. He argues that the State party should take responsibility for the supervision of solicitors accredited to the courts, to see whether they comply with their obligations under the law. The author further contends that the signed interview with Jensen, referred to by the State party, was obtained under the influence of drugs, and that this would have been revealed if he would have been called as a witness, especially because the evidence that the author was not involved in any drug deal was corroborated by other witnesses.

5.2 The author reiterates that the racist attitude of the police, resulting in violence and in fabrication of the evidence against him, led to his conviction for an offence of which he had no knowledge. He submits that the evidence against him was wholly circumstantial, except for the alleged admissions to the police, which were fabricated. He claims that the failure of the judge to rule the admissions inadmissible as evidence constitutes a denial of justice, in violation of article 14, paragraph 1; in this context, he submits that the judge did not admit evidence on behalf of the defence from a solicitor who had visited the author at the police station and who had seen that the author was upset and crying, allegedly as a result of the treatment he received from the policemen. The author also contends that there were inconsistencies in the evidence against him, that some of the prosecution witnesses were not reliable, and that the evidence was insufficient to warrant a conviction. In this context, the author points out that he was acquitted on two other charges, where the evidence was purely circumstantial, and that his conviction on the one charge apparently was based on the evidence that he had admitted his involvement to the policemen upon arrest.

5.3 The author further submits that it is apparent from the trial transcript that he had difficulties understanding the English that was used in court. He claims that, as a result, he misunderstood some of the questions put to him. He claims that his solicitor never informed him that he had the right to have an interpreter and that, moreover, it was the trial judge's duty to ensure that the trial was conducted fairly and, consequently, to call an interpreter as soon as he noticed that the author's English was insufficient.

5.4 The author further notes that one of the appeal judges who heard his appeal after the first trial also participated in the consideration of his appeal after the retrial. He claims that this shows that the Court of Criminal Appeal was not impartial, in violation of article 14, paragraph 1.

5.5 The author maintains that article 14, paragraph 5, was violated in his case, because the Court of Criminal Appeal reviews the conviction and sentence only on the basis of the legal arguments presented by the defendant's counsel and does not undertake a full rehearing of the facts. According to the author, article 14, paragraph 5, requires a full rehearing of the facts. In this context, the author also states that no possibility of direct appeal to the High Court exists, but that one has to request leave to appeal, which was refused by the Court in his case.

5.6 As regards the State party's claim that he has not exhausted domestic remedies with regard to his complaint about police treatment, the author submits that, in fact, he has addressed complaints to the Police Complaints Tribunal, the Human Rights and Equal Opportunity Commission and the Parliamentary Ombudsman, all to no avail.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the author's allegations relate partly to the evaluation of evidence by the court. It recalls that it is generally for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it is clear that a denial of justice has occurred or that the court violated its obligation of impartiality. The author's allegations and submissions do not show that the trial against him suffered from such defects. In this respect, therefore, the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.3 As regards the author's complaint that Jensen was not called as a witness during the trial, the Committee notes that the author's defence lawyer, who was privately retained, was free to call him but, in the exercise of his professional judgement, chose not to do so. The Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the author's complaint about the review of his conviction, the Committee notes from the judgement of the Court of Criminal Appeal, dated 4 July 1986, that the Court did evaluate the evidence against the author and the judge's instructions to the jury with regard to the evidence. The Committee observes that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.5 With regard to the author's claim that the appeal against his retrial was unfair, because one of the judges had participated in his prior appeal against the first conviction, the Committee notes that the judge's participation on appeal was not challenged by the defence and that domestic remedies with respect to this matter have thus not been exhausted. This part of the communication is therefore inadmissible.

6.6 As regards the author's claim about the failure to provide him with the services of an interpreter, the Committee notes that this issue was never brought to the attention of the courts, neither during the trial, nor at appeal. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

6.7 In so far as the author complains that the police used violence against him and discriminated against him on the basis of his race, the Committee notes that, to the extent that these allegations do not form part of the author's claim of unfair trial, they cannot be examined because the purported events occurred in July 1986, that is, before the entry into force of the Optional Protocol for Australia on 25 December 1991 and do not have continuing effects which in themselves constitute a violation of the Covenant. This part of the communication is therefore inadmissible ratione temporis.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) The present decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

H. Communication No. 541/1993; Errol Simms v. Jamaica (decision adopted on 3 April 1995, fifty-third session)

Submitted by:	Errol Simms [represented by counsel]
Alleged victim:	The author
State party:	Jamaica

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Errol Simms, a Jamaican citizen, currently awaiting execution at the St. Catherine District Prison, Jamaica. He claims to be the victim of violations by Jamaica of articles 6, paragraph 2; 7; and 14, paragraphs 1 and 3 (b), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 17 May 1987, the author was charged with the murder, on 12 April 1987, of one Michael Demercado. He was convicted and sentenced to death in the Kingston Home Circuit Court on 16 November 1988. On 24 September 1990, the Court of Appeal of Jamaica dismissed his appeal. The Judicial Committee of the Privy Council dismissed his petition for special leave to appeal on 6 June 1991. With this, it is submitted, domestic remedies have been exhausted. The murder for which the author stands convicted has been classified as capital murder under the Offences against the Person (Amendment) Act, 1992.

2.2 The case for the prosecution was that, on 12 April 1987, at approximately 3 a.m., the author together with two other men followed one Carmen Hanson, who returned from a party, into her house. They demanded money, threatened her and hit her. In the course of the robbery, Carmen Hanson's son, Owen Wiggan, together with Michael Demercado and another man, arrived at the house and called her. The author and his companions left the house and were confronted by the three men; Michael Demercado was then shot dead by the author.

2.3 The prosecution's case rested on the identification evidence of Carmen Hanson's common law husband, Tyrone Wiggan, and their son, Owen. Carmen Hanson testified that the assailants had been masked; she could not identify the author.

2.4 Tyrone Wiggan testified that, during the robbery, he was in his bedroom, opposite to the room where his wife was assaulted; the light in the latter room was turned on. He stated that he could observe the author, who was masked, through a one foot space at the bottom of the bedroom door; although the author had his back turned towards him for most of the time, he recognized the author, whom he had known for two or three years, from the slight hunch in his back and from certain other features. He further testified that, when the author left the room, he was able to see him from the front for two seconds.

2.5 Owen Wiggan testified that he faced the author, whom he knew since childhood, from a distance of 10 feet, for about three minutes. He stated that he was able to recognize the author as the street light in front of the house illuminated the entrance where the three men were standing, and that he saw the author firing at Michael Demercado. He further stated that he had seen the author earlier that evening at the party, where he had been involved in an argument with the deceased.

2.6 The defence was based on alibi. The author gave sworn evidence in which he denied having been at the party and testified that he had been at home with his girlfriend, going to bed at 8 p.m. and awaking at 6 a.m. the following morning. This evidence was corroborated by his girlfriend.

Complaint

3.1 Counsel submits that there were serious weaknesses in the identification evidence, namely, that identification occurred at night, that Tyrone Wiggan had a limited opportunity to obtain a front view of the assailant and that he partly identified the author because of his nose and mouth despite the fact that the assailant was masked. Counsel further submits that it appears from Owen Wiggan's statement to the police that he did not identify the author, whereas at the trial he stated to the police that the author was the assailant.

3.2 Counsel notes that the author was not placed on an identification parade; he submits that in a case in which the prosecution relies solely on identification evidence, an identification parade must be held.

3.3 As to the trial, counsel submits that the trial judge failed to direct the jury properly about the dangers of convicting the accused on identification evidence alone. Counsel submits that the judge's misdirections on the issue of identification constituted the main ground of appeal and that the Court of Appeal, having found no fault with them, dismissed the appeal. Similarly, the petition for special leave to appeal to the Judicial Committee of the Privy Council was based on the issue of identification. As to the refusal to give leave to appeal, counsel argues that, in view of the fact that the Privy Council limits the hearing of appeals in criminal cases to cases where, in its opinion, some matter of constitutional importance has arisen or where a "substantial injustice" has occurred, its jurisdiction is far more restricted than that of the Human Rights Committee.

3.4 It is submitted that during the preliminary inquiry the author was represented by a privately retained lawyer, who only took a short statement from him. The lawyer resigned, because he was not satisfied with the fees he was paid, while the proceedings in the Gun Court were still pending. The author was then assigned a legal aid lawyer. The author alleges that he first met with his lawyer just before the trial started, and complains that the lawyer did not adequately represent him, which, according to the author, is due to the fact that legal aid lawyers are paid "little or no money". As to the appeal, it is submitted that the author probably had no choice as to his lawyer, nor the opportunity to communicate with him prior to the hearing. In this context, it is submitted that counsel for the appeal informed counsel in London that he could not recall when he had visited the author and for how long he had spoken to him, and that he was paid the "princely sum of about 3 pounds to argue the appeal".

3.5 It is argued that the facts mentioned above constitute a violation of article 14, paragraphs 1 and 3 (b), of the Covenant. In view of the above, it is also submitted that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been violated constitutes a violation of article 6, paragraph 2, of the Covenant.

3.6 The author claims that he was beaten by the police upon his arrest, in violation of articles 7 and 10, paragraph 1, of the Covenant.

3.7 Counsel argues that in view of the fact that the author was sentenced to death on 16 November 1988, the execution of the sentence at this point in time would amount to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant. Counsel asserts that the time spent on death row already constitutes such cruel, inhuman and degrading treatment. To support this claim, counsel refers to a report on the conditions in St. Catherine District Prison prepared by a non-governmental organization in May 1990.

3.8 It is stated that the matter has not been submitted to any other instance of international investigation or settlement.

State party's observations and counsel's comments thereon

4. The State party, by submission of 5 August 1993, argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party argues that it is open to the author to seek redress for the alleged violations of his rights by way of constitutional motion.

5. In his comments, counsel submits that, although a constitutional remedy exists in theory, it is unavailable to the author in practice, because of his lack of funds and the State party's failure to provide legal aid for constitutional motions.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that part of the author's allegations relate to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.3 The author has further claimed that he had not sufficient time to prepare his defence, in violation of article 14, paragraph 3 (b), of the Covenant. The Committee notes that the lawyer who represented the author at his trial has stated that, in fact, he did have sufficient time to prepare the defence and to call witnesses. With regard to the appeal, the Committee notes that the appeal judgement shows that the author was represented by counsel who argued the grounds for the appeal and that the author and his present counsel have not specified their complaint. In these circumstances the Committee considers that the allegation has not been substantiated, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 As regards the author's claim that he was beaten by the police upon arrest, the Committee notes that this claim was never brought to the attention of the Jamaican authorities, neither in the author's sworn evidence at the trial, nor on appeal, or in any other way. The Committee refers to its standard jurisprudence that an author should show reasonable diligence in the pursuit of available domestic remedies. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies.

6.5 The Committee next turns to the author's claim that his prolonged detention on death row amounts to a violation of article 7 of the Covenant. Although some national courts of last resort have held that prolonged detention on death row for a period of five years or more violates their constitutions or laws, 1/ the jurisprudence of this Committee remains that detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances. 2/ The Committee observes that the author has not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1/ See, inter alia, the judgement of the Judicial Committee of the Privy Council, dated 2 November 1993 (Pratt and Morgan v. Jamaica).

2/ See the Committee's views on communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, paragraph 12.6. See also, inter alia, the Committee's views on communications Nos. 270/1988 and 171/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, and No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993.

I. Communication No. 553/1993; Michael Bullock v. Trinidad and Tobago (decision adopted on 19 July 1995, fifty-fourth session)

Submitted by:	Michael Bullock
Alleged victim:	The author
State party:	Trinidad and Tobago

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Michael Bullock, a Trinidadian citizen, at the time of submission of the communication awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be the victim of violations by Trinidad and Tobago of article 14, paragraphs 1, 2 and 3(e), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author:

2.1 On 25 April 1981, the author, together with one P.S., was charged with the murder of one H.McG. On 27 May 1983, he was found guilty as charged and sentenced to death; his co-accused was acquitted. The Court of Appeal dismissed the author's appeal on 21 April 1988. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 9 November 1990. On 19 August 1993, a warrant was issued for the execution of the author on 24 August 1993; on 23 August 1993, the High Court granted a stay of execution, following the filing of a constitutional motion on the author's behalf.

2.2 Following the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Jamaica, the author's death sentence was commuted to one of life imprisonment.

2.3 At the trial, the prosecution's case rested mainly on the testimony of one Movin Brown, who lived at the same address as the author. This witness testified that, in the morning of 25 April 1981, he saw the author pull the victim out of her car, and beat her to death. During the trial, the author made an unsworn statement from the dock. He testified that he was present at the time of the incident, but that it was Movin Brown who beat and killed the deceased, and later threatened him. The prosecution also relied on oral statements made by the author testifying to his involvement in the robbery, as well as on circumstantial evidence.

2.4 During the trial, the defence sought to challenge the credibility of Movin Brown on the basis of a statement made by him to the police in 1976, concerning another murder case for which he had been tried, but had been acquitted (reportedly on the ground that the cause of death was not established). The judge, however, did not allow counsel to cross-examine Movin Brown on the basis of this statement, and refused counsel's request to admit the statement in evidence.

The complaint:

3.1 It is submitted that Movin Brown's prior statement was highly relevant to the issue of his credibility, and that the judge, by refusing counsel to cross-examine him on this point, and by refusing to admit the statement in evidence, violated the author's rights under article 14, paragraphs 1 and 3(e).

3.2 Counsel further points out that the trial judge, when instructing the jury, said: "[...] what Bullock has said in his defence by his statement in the dock is an exercise of his right to speak as an accused person and his right to speak from where he is. But as you have heard from time to time, wherever there are rights, there are responsibilities and I will come to that". The judge later said: "I said earlier, wherever there are rights, there are responsibilities. These responsibilities are not limited to the accused alone. They spread to his legal representative as well. This is the law of this country". And he further said: "As I said, the accused exercised his right, but rights carry responsibilities".

3.3 It is submitted that the judge's instructions were unfair, since he did not give any guidance to the jury as to what he meant by the word "responsibilities" in this connection. Counsel argues that the judge, by using such language, left the jury under the impression that the author had failed to discharge some responsibility which he was obliged to perform, and that, since the exact nature of that responsibility was not made clear, the jury could have interpreted it to mean that the author had a responsibility to give a sworn statement. Counsel further argues that the judge's comments could also have been interpreted by the jury to mean that the author had in some way been irresponsible in levelling, as the judge himself put it, "serious and grave allegations" against Movin Brown. The judge's instructions to the jury are said to amount to a further violation of article 14, paragraph 1, and in addition, to a violation of article 14, paragraph 2, of the Covenant.

The State party's observations on admissibility and the author's comments:

4.1 By submission of 4 November 1993, the State party argues that the communication is inadmissible.

4.2 The State party points out that on 23 August 1993, after a warrant for the author's execution had been issued, the author filed a constitutional motion before the High Court, seeking a declaration that the execution of the sentence of death against him would be unconstitutional, as well as an order to vacate the sentence of death and to stay the execution. On 23 August 1993, the Court granted a conservatory order, staying the author's execution. The State party concludes that domestic remedies have not been exhausted and that the communication is thus inadmissible.

4.3 As regards the Committee's request, under rule 86 of its rules of procedure, that the State party not carry out the death penalty against the author while his communication is being considered by the Committee, the State party states that, in view of the inadmissibility of the communication, it is not prepared to give such an undertaking. It refers, however, to the stay of execution ordered by the High Court, and states that it will abide by it.

4.4 The State party encloses a copy of the judgement of the Court of Appeal in the author's case. It submits that the Court of Appeal dealt extensively with the refusal of the trial judge to admit the statement made by Movin Brown, as well as with the judge's directions regarding the author's statement from the dock. The Court of Appeal concluded that the trial judge had acted properly in both the conduct of the trial and in his summing up to the jury, and dismissed the appeal.

4.5 The State party claims that the author is seeking to use the Human Rights Committee as a final court of appeal. It argues that this is contrary to the Committee's jurisprudence and incompatible with the provisions of the Covenant.

5.1 In his comments on the State party's submission, the author argues that his constitutional law motion does not render his communication to the Committee inadmissible under article 5, paragraph 2(b), of the Optional Protocol. He submits that the constitutional motion only concerns the constitutionality of the execution of his death sentence, and does not concern his claim of unfair trial.

5.2 The author further argues that, while it is true that it is not in principle for the Committee to evaluate facts and evidence in a particular case, or to review the judge's instructions to the jury, the Committee does have competence to do so where it can be ascertained that the proceedings have been arbitrary or manifestly unjust, amounting to a denial of justice. The author argues that the judge's refusal to have him cross-examine thoroughly the prosecution's main witness as well as the judge's instructions to the jury, improperly shifting the burden of proof onto him, amounted to a denial of justice, and that the Committee therefore is competent to examine his communication.

6. In a further submission, dated 18 July 1994, the State party informs the Committee that the author's death sentence has been commuted to one of life imprisonment for the rest of his natural life, following the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. the Attorney General of Jamaica, in which it was held that in any case in which execution is to take place more than five years after

sentence, there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or treatment".

Issues and proceedings before the Committee:

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee regrets that the State party was not prepared to give the undertaking requested by the Committee under rule 86 of its rules of procedure, not to execute the death sentence against the author while his case was under examination under the Optional Protocol, since the State party considered the communication inadmissible. The Committee observes that it is not for the State party, but for the Committee, to decide whether or not a communication is admissible. The Committee requests the State party to cooperate fully with the Committee's examination of communications in the future.

7.3 The Committee notes that part of the author's allegations relate to the instructions given by the judge to the jury. The Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate Courts of States parties, to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee has taken note of the author's claim that the instructions in the instant case were manifestly unjust. The Committee has also noted the Court of Appeal's consideration of this claim, and concludes that in the instant case the trial judge's instructions did not show such defects as to render them manifestly arbitrary or a denial of justice. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7.4 As regards the author's claim that the judge's refusal to admit the 1976 statement by the main prosecution witness in evidence or to allow cross-examination of this witness on the statement violated his rights under article 14, paragraphs 1 and 3(e), of the Covenant, the Committee considers that it is generally for the appellate courts of States parties, and not for the Committee, to review the judge's discretion in relation to the admission of evidence unless it can be ascertained that the exercice of the discretion was manifestly arbitrary or amounted to a denial of justice. Since no such defects have been shown in the instant case, this part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as being incompatible with the provisions of the Covenant.

8. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, to the author and to the author's counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

J. Communication No. 575 & 576/1994; Lincoln Guerra & Brian Wallen v. Trinidad and Tobago; (decision adopted on 4 April 1995, fifty-third session)

Submitted by:	Lincoln Guerra and Brian Wallen [deceased] [represented by counsel]
Alleged victims:	The authors
State party:	Trinidad and Tobago

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Adopts the following:

Decision on admissibility

1. The authors of the communications are Lincoln Guerra and Brian Wallen, two Trinidadian citizens who, at the time of submission of their communications, were awaiting execution at the State Prison at Port-of-Spain, Trinidad and Tobago. Mr. Wallen died of AIDS in the State Prison on 29 July 1994. It is submitted that they are victims of violations by Trinidad and Tobago of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as submitted by the authors

2.1 The authors were arrested in January 1987 and charged with two counts of murder. They were found guilty as charged and sentenced to death in the Port-of-Spain Assizes Court on 18 May 1989. Their appeal against conviction and sentence was dismissed on 2 November 1993. On 21 March 1994, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal.

2.2 On 24 March 1994, at 2 p.m., warrants were read to the authors for their execution at 7 a.m. the following morning, 25 March. Lawyers in Trinidad, acting pro bono, immediately filed constitutional motions on the authors' behalf, claiming that the carrying out of the executions would violate their constitutional rights. In the context, reference was made to the judgement of the Judicial Committee of the Privy Council in the case of Pratt & Morgan v. Attorney-General, a/ where it was held that execution after a long delay could constitute inhuman punishment and thus would be unlawful under the Constitution of Jamaica, a similar provision being contained in the Constitution of

Trinidad and Tobago.

2.3 An application for a stay of execution was filed on the authors' behalf, pending determination of the constitutional motions. On 24 March 1994, at 10 p.m., the application was heard by a single High Court judge, who refused to grant a stay. Notice of appeal to the Court of Appeal was filed immediately. The appeal against dismissal of the request for a stay was heard by a single judge of the Court of Appeal at 1 a.m. on 25 March. At 3.25 a.m., this judge dismissed the appeal but granted leave to appeal to the Judicial Committee of the Privy Council, together with a stay of execution for 48 hours, pending determination of such an appeal. At 5.25 a.m., the Judicial Committee granted a conservatory order, staying execution for four days, pending the filing of a proper appeal to the Judicial Committee. At 6 a.m., the Attorney-General of Trinidad and Tobago applied to the full Court of Appeal to set aside the 48-hour stay granted by the single judge. On reading a faxed copy of the order of the Judicial Committee, the Court of Appeal adjourned the hearing of the Attorney-General's motion until 28 March 1994. On 28 March, the Judicial Committee adjourned the hearing of the petition for leave to appeal from the single judge's decision until 25 April 1994, and extended the order for a stay of execution until after the determination of the petition on 25 April 1994.

2.4 On 31 March 1994, the Court of Appeal heard the application of the Attorney-General. It concluded that the single judge had erred in granting the authors leave to appeal to the Judicial Committee, without recourse to the full Court of Appeal, but decided not to set aside the judge's order, since the Judicial Committee was already seized of the matter.

2.5 On 18 April 1994, the High Court rejected the authors' constitutional motions and refused to grant a stay of execution, pending the exercise by the authors of their right to appeal to the Court of Appeal. On 25 April 1994, the Judicial Committee's stay lapsed, but the Attorney-General gave an undertaking that no execution would take place until the hearing of an application for a stay to the Court of Appeal. On 29 April 1994, the Court of Appeal granted a conservatory order, directing that the death sentences not be carried out until after it had decided on the constitutional motions. The authors unsuccessfully tried to obtain an undertaking from the Attorney-General that no execution would take place pending any further appeal to the Judicial Committee.

2.6 The Court of Appeal reserved judgement on the authors' constitutional motions on 9 June 1994. Following the execution of Glen Ashby on 14 July 1994, the authors again sought an undertaking from the Attorney-General that no executions would be carried out pending the determination of appellate proceedings in respect of their constitutional motions. The Attorney-General, however, refused to give such an undertaking.

2.7 On 25 July 1994, the Judicial Committee heard the authors' petition for leave to appeal against the dismissal of their application for a stay of execution; on 26 July 1994, the Judicial Committee granted a conservatory order, directing that the death sentences not be carried out on the authors until it had decided on their appeal in respect of their constitutional motions. On 27 July 1994, the Court of Appeal of Trinidad and Tobago rejected the constitutional motions and refused to order a stay of execution. An appeal against the latter judgement remains currently (at the end of February 1995) pending before the Judicial Committee.

The complaint

3.1 For the claims under articles 6, 7, and 14, reference is made to the authors' sworn affidavits, and to the grounds argued on their behalf in the constitutional motions and in their petitions for a stay of execution.

3.2 Before the High Court of Trinidad, it was argued that no executions had been carried out in Trinidad and Tobago since 1979, that the authors had been confined to death row under appalling conditions since 1989, and that they had the legitimate expectation that the death sentences would not be carried out against them, pending the determination of the Advisory Committee on the Power of Pardon. It was noted in this context that the authors had not been given the opportunity to be heard by the Advisory Committee on the Power of Pardon or by the Minister of National Security, prior to the making of the decision not to recommend the granting of a pardon. It was also submitted that the authors had been denied such procedural provisions as would ensure the execution of the death sentence against them within a reasonable time. In the circumstances, it is argued that the execution of the death sentence after a long delay would amount to cruel and inhuman treatment and punishment, and would violate the authors' right to life, liberty and security of the person, their right not to be deprived thereof, except by due process of law, and their right to equality before the law guaranteed to them under the Constitution of Trinidad and Tobago.

3.3 It is submitted further (as had been argued before the Judicial Committee) that giving a mere 17 hours of notice of the date of the intended execution was improper in that it was wholly contrary to recognized practice, and that it denied the authors the right to have recourse to the courts, of making representations to the Human Rights Committee or the Inter-American Commission on Human Rights, and to prepare themselves spiritually to meet their death. Counsel notes that under the terms of the "practice" which existed in Trinidad in respect of death penalty cases, a condemned prisoner is informed on a Thursday that a warrant has been issued for his execution not earlier than the following Tuesday.

3.4 The authors contend that in the light of the Judicial Committee's judgement in Pratt & Morgan, as well as the subsequent commutation of over 50 death sentences, and because of the delay of 4 years and 10 months in the hearing of all the appeals in their criminal case, they were justified in believing that their sentence of death would also be commuted to life imprisonment.

3.5 As to the conditions of detention on death row, both authors submit that they are confined to a small cell measuring approximately 9 feet by 6 feet; there is no window, only a small ventilation hole. The entire cell block is illuminated by means of fluorescent lights which are kept on all night and affect [their] ability to sleep. The authors are kept in the cell 23 hours a day, except on weekends, public holidays and days of staff shortage, when they are locked in for the entire 24-hour period. Apart from the one hour of exercise in the yard, they are permitted to leave the cell only to meet with visitors and to have a bath once a day, during which time they can clean out the slop pail. Exercise is conducted with handcuffs on in a very small yard. The authors note that, since they have been on death row, they have witnessed the reading of death warrants to several inmates, and all scheduled executions were prevented by last minute stays of execution. As a result, they have lived in constant fear every day of their confinement to death row. Their incarceration in these circumstances has had serious adverse impacts on their mental health - they suffer from constant depression, have difficulties in concentrating and are extremely nervous.

The State party's information and observations

4.1 In its submission under rule 91 of the rules of procedure, dated 23 June 1994, the State party submits that the communications are inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the authors submitted their case to the Inter-American Commission on Human Rights, where it was registered as communication No. 11279. This complaint alleges that they were victims of violations of articles 5 and 8, sections 1 and 2H of the Inter-American Convention on Human Rights, namely, the right to be free from cruel or inhuman treatment or punishment, the right to a fair trial within a reasonable time, and the right to appeal in a criminal case. Therefore, this complaint raises substantially the same questions as have been raised before the Human Rights Committee (violations of articles 7 and 14 of the Covenant).

4.2 For the State party, the authors have failed to specify the manner in which their rights under articles 7 and 14 of the Covenant were allegedly violated. It notes that, given the authors' reliance on the judgement of the Judicial Committee in Pratt & Morgan, it appears that they are arguing that the delays in determining their criminal appeals were so inordinate that the execution of the death sentence at this juncture would be in violation of articles 7 and 14. The State party denies that there has been an "inordinate delay" within the meaning of the Judicial Committee's judgement in the authors' case. It adds, "nevertheless, a constitutional motion may be brought for relief on these grounds, as was the case in Pratt & Morgan".

4.3 The State party argues that an effective domestic remedy remains available to the authors: "In Pratt & Morgan, relief was granted to [the] appellants, namely, the commutation of the sentence of death. ... Such relief would be available to the authors if the Court were to hold that there had been a violation of the authors' constitutional rights".

4.4 The State party notes that the authors did file constitutional motions (High Court Actions Nos. 1043 and 1044 of 1994), which were dismissed on 18 April 1994. The authors' appeal to the Court of Appeal was dismissed at the end of July 1994. A right to appeal to the Judicial Committee remains open to them. In the circumstances, the State party contends that the case is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.5 As to the request for interim protection under rule 86 issued by the Committee's Special Rapporteur for New Communications on 21 April 1994, the State party notes that it continues to be bound by the conservatory order issued by the Court of Appeal on 29 April 1994. In the circumstances, the State party "is not prepared ... to give the undertaking requested by the Committee".

4.6 In another submission dated 7 September 1994, the State party recalls the terms of the Judicial Committee of the Privy Council's conservatory order of 25 July 1994:

> "(a) ... in the event of the Court of Appeal dismissing the (authors') appeal and not granting immediately thereupon the authors' application dated 25th July 1994 for a conservatory order staying their execution; and
>
> "(b) on the (authors') undertaking by Counsel in such an event to appeal to the Judicial Committee of the Privy Council against the order dismissing their appeal and to file all relevant documents in accordance with the time limits set out in the relevant rules:
>
> > "A conservatory order be granted directing that the sentence of death be not carried out on the (authors) until after the determination of such appeal by the Judicial Committee of the Privy Council".

In the light of the above, the State party reiterates that the communications are inadmissible on the ground of non-exhaustion of domestic remedies.

4.7 The State party further confirms that Mr. Wallen died in hospital on 29 July 1994, and notes that the post-mortem examination showed that death was due to meningitis caused by AIDS.

5.1 In her comments, counsel observes that the plea of non-exhaustion of domestic remedies advanced by the State party is inconsistent with the clearly manifested intention of Trinidad and Tobago to execute the authors on merely 17 hours' notice, within three days after the confirmation of their conviction, irrespective of their desire to make representations to the Mercy Committee for commutation of their death sentences, to apply to the courts of Trinidad for relief staying their execution and to apply to the Human Rights Committee.

5.2 Counsel contends that the determination of the State party to execute Mr. Guerra irrespective of undetermined violations of the author's constitutional rights or rights under the Covenant is demonstrated by the events surrounding the execution of Glen Ashby in July 1994; Mr. Ashby was executed after his case had been submitted to the Human Rights Committee.

5.3 It is submitted that domestic remedies within the meaning of the Optional Protocol must be effective in the sense of being reasonably available, rather than a theoretical possibility. Measures designed to secure the availability of a remedy are said to include (a) giving the condemned person the possibility, after confirmation of conviction, to make representations to the Mercy Committee and to bring a constitutional motion to review judicially the refusal of commutation; (b) ensuring that executions are not carried out pending the hearing of such motions; and (c) providing for a reasonable opportunity to submit a communication to the Human Rights Committee.

5.4 Counsel further argues, by reference to an affidavit from a Trinidadian lawyer, that legal aid is not granted with respect to constitutional motions staying the execution of a death sentence. b/ The fact that Mr. Guerra obtained the pro bono services of lawyers both in Trinidad and Tobago and in London does not, in counsel's opinion, make the remedy of a constitutional motion "available" within the meaning of the Optional Protocol.

5.5 Counsel notes that the stay granted by the Judicial Committee of the Privy Council in July 1994 may make it possible to clarify the law and whether in future the State party would be obliged to stay an execution while judicial proceedings are instituted, but submits that in the light of the judgement of the Court of Appeal of 27 July 1994 rejecting both constitutional motion and a stay of execution, it is difficult to argue that the State party's law and practice provides an effective remedy in respect of alleged violations of article 6 of the Covenant.

5.6 By a letter dated 19 October 1994, counsel informs the Committee that with regard to the communication of Mr. Wallen, she has been "unable to obtain any further instructions" and proposes that no further action should be taken in relation to his communication.

5.7 By a further submission dated 10 November 1994, counsel forwards a formal note by Mr. Guerra's representative in Trinidad, dated 8 November 1994 and addressed to the Inter-American Commission on Human Rights, informing the latter instance that Mr. Guerra does not wish to pursue his case before it since his communication is under consideration by the Human Rights Committee.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 91 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted that Mr. Wallen died on 29 July 1994, and that his death is attributable to natural causes. It further notes that counsel has been unable to obtain further instructions in respect of Mr. Wallen's complaint. In the circumstances, the Committee concludes that it would serve little purpose to continue consideration of the case inasmuch as it relates to Mr. Wallen.

6.3 The Committee has noted counsel's statement that the case of Mr. Guerra has been withdrawn from consideration by the Inter-American Commission on Human Rights. While taking note of the State party's information of 23 June 1994 in this respect, it concludes that it is not precluded from considering the case of Mr. Guerra on the basis of article 5, paragraph 2 (a), of the Optional Protocol.

6.4 The Committee has noted the State party's claim that available and effective remedies remain open to Mr. Guerra, as well as counsel's counter-arguments in this respect. While it is true that domestic remedies within the meaning of the Optional Protocol must be both available and effective, that is, have a reasonable prospect of success, the Committee does not consider that the securing of legal assistance for the purpose of constitutional motions on a pro bono basis necessarily implies that the remedy so initiated is not "available and effective" within the meaning of the Optional Protocol. In this context, the Committee notes that counsel herself concedes that the petition for leave to appeal currently pending before the Judicial Committee may make it possible to clarify the law; it further notes that counsel confirmed, by a call of 21 February 1995, that the hearing of the petition could not be expected for another three to four months, and that the arguments on Mr. Guerra's behalf were being prepared. In the circumstances, the Committee considers that the pursuit of a petition for leave to appeal before the Judicial Committee of the Privy Council cannot be considered ineffective and concludes that, in the circumstances, the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

6.5 The Committee deeply regrets that the State party is not prepared to give the undertaking requested by the Committee on 21 April 1994, apparently because it considers itself bound by the conservatory order issued by the Court of Appeal on 29 April 1994. In the Committee's opinion, this situation should have made it easier for the State party to confirm that there would be no obstacles to acceding to the Committee's request; to do so would, in any event, have been compatible with the State party's international obligations.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) The present decision may be reviewed pursuant to rule 92, paragraph 2, of the Committee's rules of procedure, upon receipt of information from Mr. Guerra or from his representative to the effect that the reasons for declaring the complaint inadmissible no longer apply;

(c) The present decision shall be communicated to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

a/ Decision of 2 November 1993, Privy Council Appeal No. 10 of 1993.

b/ The affidavit referred to, sworn by Ms. Alice L. Yorke-Soo Hon on 28 April 1994, states "... with respect to Constitutional Motions involving staying the execution of the sentence of death for prisoners on death row, so far as I am aware, during the period 1985 to [the] present, legal aid was granted in only two such matters, namely ... [in the cases of] Theophilus Barry and ... Andy Thomas/Kirkland Paul".

K. Communication No. 578/1994, Leonardus J. de Groot v. the Netherlands (decision adopted on 14 July 1995, fifty-fourth session)

Submitted by:	Leonardus Johannes Maria de Groot [represented by counsel]
Alleged victim:	The author
State party:	The Netherlands

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Leonardus Johannes Maria de Groot, a Dutch citizen, residing in Heerlen, the Netherlands. The author claims to be a victim of a violation by the Netherlands of articles 4, 6, 7, 14, 15, 17, 18 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author:

2.1 The author is a peace activist and, in November 1988, attended a camp in Vierhouten, close to a military base, to participate in civil disobedience actions against militarism. He distributed flyers explaining the purpose of the camp and, on one occasion, painted a peace symbol on a military vehicle. He was arrested on 6 November 1988 and charged with public violence and participation in a criminal organization. On 18 November 1988, the Zwolle Magistrate's Court found him guilty of the charge of public violence and sentenced him to a fine of f. 100.00. He was acquitted on the charge of participation in a criminal organization.

2.2 On 22 November 1988, the public prosecutor filed an appeal against the judgement. The Arnhem Court of Appeal, on 26 May 1989, declared void the charge of public violence on the ground that it lacked precision but found the author guilty on the charge of participation in a criminal organization. He was sentenced to one month's imprisonment (suspended for two years) and a fine of f. 1,000.00. The author subsequently appealed the Court of Appeal's judgement in cassation. On 19 January 1991, the Supreme Court (Hoge Raad) of the Netherlands rejected his appeal. With this, it is submitted that all domestic remedies have been exhausted.

2.3 The prosecution argued that the peace camp had as its object and purpose to engage in criminal activities and that the author, by participating, was part of a criminal organization, that is, an organization with the aim and purpose of using violence against persons and/or goods, and/or of illegally destroying or damaging property, and/or of stealing and/or of inciting others to commit the above offences. The prosecution based itself on public announcements made by the campers, before and during the camp, including a public letter to the population, in which it was clearly stated that the actions undertaken by the campers would involve illegal activities, such as damaging the fence surrounding the military base, blocking the entrance gate and painting symbols and/or slogans on military objects.

2.4 The Appeal Court considered that it was proven that the author, from 1 to 6 November, had participated in the peace camp, an organization with the aim of using violence against property and/or wilfully and illegally destroying or damaging property or rendering it useless and/or inciting others to commit those crimes and/or to be an accessory to those crimes. It concluded that the author had therefore violated article 140 of the Criminal Code by participating in an organization with a criminal intent. Article 140 of the Dutch Criminal Code penalizes participation in an organization which has as its purpose the commission of crimes.

2.5 The author's defence counsel argued that article 140 of the Criminal Code was void because of its vagueness; in this connection, he referred to article 15 of the Covenant. It was further argued that the peace camp was not an organization within the meaning of article 140, since there were no decision-making mechanisms and each person decided for himself or herself whether or not to engage in a certain activity in association with others. According to the defence, the only form of organization was that someone had reserved the camp-site and that transport had been arranged for those who needed it.

2.6 The Court of Appeal rejected the argument of the defence, stating that the fact that article 140 required further interpretation by the judiciary did not make it void. In this context, the Court considered that the organization of different camps under similar names, the announcement of those camps, the provision of addresses for further information, the sharing of the costs of the camps and the fact that the local population had been informed about the purpose of the camps, all indicated that an organization within the meaning of article 140 existed. Although no formal membership existed, the Court considered that participation in the organization was proved by the active participation in the activities organized by the campers.

2.7 In a further submission the author states that, on 16 July 1989, he, together with others, was carrying out some peace activities at the Valkenburg air base with the intention of hindering the ongoing militarization and that he was subsequently charged under article 140 of the Criminal Code for participating in a criminal organization. On 25 January 1991, the District Court in The Hague sentenced him to a fine of f. 750 and two weeks' suspended imprisonment. On 9 June 1992, the Court of Appeal sentenced the author to two weeks' imprisonment. The author's appeal in cassation was rejected by the Supreme Court on 11 May 1993.

The complaint:

3.1 The author claims that his convictions are in violation of articles 14 and 15 of the Covenant. In this context, he states that his convictions were in violation of article 14 of the Covenant, since he was not informed in detail about the nature of the charges against him. He also submits that the charges against him, based on article 140 of the Criminal Code, were so vague as to amount to a violation of his right to be informed in detail of the nature and cause of the charge against him. He further submits that the application of article 140 of the Criminal Code in his case violates the principle of legality, since the text of the article is so vague that it could not have been foreseen that it was applicable to the author's participation in civil disobedience activities.

3.2 The author also claims that his convictions are unjust because he acted under a higher legal obligation. In this context, the author argues that the possession of nuclear weapons and the preparation for the use of nuclear weapons violate public international law and amount to a crime against peace and a conspiracy to commit genocide. He submits that the Netherlands military strategy violates not only international norms of humanitarian law, but also articles 4, 6 and 7 of the International Covenant on Civil and Political Rights.

3.3 In respect to his second conviction, the author states that he is a victim of a violation of article 26 of the Covenant, because another participant in the so-called "criminal organization" was not prosecuted, according to the author, because he was a spy of the secret service.

3.4 The author does not explain why he considers himself to be a victim of a violation of articles 17 and 18 of the Covenant.

3.5 The author states that he has earlier submitted the same matter to the European Commission of Human Rights, which declared his application inadmissible.

Facts and proceedings before the Committee:

4.1 Before considering any claim in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 With regard to the author's allegation that he was the victim of a violation of article 14 of the Covenant, the Committee, after examining the court documents, notes that the question raised by the author was considered by the Netherlands courts, including the Court of Cassation, which found that the charge and the facts on which it was based were sufficiently precise, namely that, in conjunction with other accomplices, he placed anti-militarist slogans on military vehicles and participated in other activities, after illegally having gained access to the military base. The Committee notes that the Human Rights Committee does not constitute a final appeal body and is not in a position to challenge the national courts' assessment of the facts and evidence. Consequently, this part of the communication is inadmissible under article 3 of the Optional Protocol.

4.3 The author has further claimed to be a victim of a violation of article 15 of the Covenant, because he could not have foreseen that article 140 of the Criminal Code, on the basis of which he was convicted, was applicable to his case by virtue of its imprecision. The Committee refers to its established jurisprudence[56] that interpretation of domestic legislation is essentially a matter for the courts and authorities of the State party concerned. Since it does not appear from the information before the Committee that the law in the present case was interpreted and applied arbitrarily or that its application amounted to a denial of justice, the Committee considers that this part of the communication is inadmissible under article 3 of the Optional Protocol.

4.4 As regards the author's claims under articles 4, 6 and 7 of the Covenant, the Committee considers that the author has failed to show, by mere reference to the State party's military strategy, that he is himself a victim of a violation of these articles by the State party. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

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[56] See, inter alia, the Committee's decision in communication No. 58/1979 (Anna Maroufidou v. Sweden), para. 10.1 (Views adopted on 9 April 1981).

4.5 As regards the author's claim under articles 17 and 18 of the Covenant, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that his rights under these articles were violated. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.6 With regard to the author's claim under article 26, the Committee recalls that the Covenant does not provide a right to see another person prosecuted,[57] nor does the absence of prosecution against one person render the prosecution of another person involved in the same offence necessarily discriminatory, in the absence of specific circumstances revealing a deliberate policy of unequal treatment before the law. Since no such circumstances have been shown in the instant case, this part of the communication is therefore inadmissible, as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision should be communicated to the author of the communication, to his counsel and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[57] See, inter alia, the Committee's inadmissibility decisions with respect to communications Nos. 213/1986 (H.C.M.A. v. the Netherlands) and 396/1990 (M.S. v. the Netherlands).

L. Communication No. 583/1994, Ronald H. van der Houwen v. the Netherlands (decision adopted on 14 July 1995, fifty-fourth session)

Submitted by:	Ronald Herman van der Houwen [represented by counsel]
Alleged victim:	The author
State party:	The Netherlands

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 27 July 1993, is Ronald Herman van der Houwen, citizen of the Netherlands, at the time of submission of the communication detained in a penitentiary in Utrecht. He claims to be a victim of a violation by the Netherlands of article 9, paragraph 3, of the Covenant. He is represented by counsel.

The facts as submitted by the author:

2.1 The author was arrested on 12 February 1993, at 11.45 p.m., after police officers had entered his apartment where he was selling cocaine to visitors. On 13 February 1993, at 12.30 p.m., he was charged with the possession and selling of cocaine, and placed in detention. On 16 February 1993, the author was brought before the examining magistrate (rechter commissaris).

2.2 At the hearing, counsel argued that since his client was brought before the magistrate more than three days after he was detained, his detention was unlawful and he should be released. The examining magistrate rejected this argument and ordered the author's further detention for 10 days.

2.3 The author then requested the Utrecht Regional Court (Arrondissementsrechtbank) to quash the detention order. On 24 February 1993, the Court rejected the author's request and ordered his continuing detention for another 30 days. It considered that the detention of three days and one hour was not unlawful, since the Prosecutor had filed the request for further detention within the three-day period prescribed by law. It further considered that grounds existed to order the author's continuing detention. The author appealed the order of the Court to the Court of Appeal in Amsterdam, which dismissed the appeal on 31 March 1993, while setting aside the Regional Court's first consideration. No further appeal against this decision is possible.

2.4 On 25 May 1993, the author was found guilty of the charges against him and sentenced to 25 months' imprisonment, of which 5 months suspended, and confiscation of the money found in his possession at the time of his arrest.

The complaint:

3.1 The author claims that 73 hours of detention without being brought before a judge is in violation of the State party's obligation under article 9, paragraph 3, to bring anyone arrested or detained on a criminal charge promptly before a judge.

3.2 The author states that the same matter has not been submitted to any other procedure of international investigation or settlement.

Issues and proceedings before the Committee:

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author has claimed that his detention was unlawful under domestic law, because he was not brought before the investigating magistrate within three days. The Committee recalls that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not for the Committee to examine whether the courts applied the domestic law correctly, unless the application by the courts would violate the State party's obligations under the Covenant.

4.3 The Committee observes further that the information before it shows that the author, who claims to be a victim of a violation of article 9, paragraph 3, of the Covenant, was in fact promptly brought before a judge or other officer authorized by law to exercise judicial power. The Committee considers that the facts as presented do not raise any issue under article 9, paragraph 3, of the Covenant and that the communication is therefore inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author, to his counsel and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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